

Articles

The Birth of the Prison Retold

George Fisher[†]

CONTENTS

I. THE TOWN, ITS CRIME, ITS COURTS, AND JUSTICE BAYLEY	1245
II. THE TRANSFORMATION OF PUNISHMENT IN MANCHESTER	1258
III. THE NEW STRATEGY OF PUNISHMENT	1267
A. <i>The Impact of War and Fever</i>	1267
B. <i>The Strategy of Correction</i>	1271
IV. THE NEW VIEW OF CRIMINALITY	1277
A. <i>Opportunistic Criminals: Deterrent Punishment</i>	1277
B. <i>Passive Criminals: Corrective Punishment</i>	1281
V. CHILD LABOR AND THE ESTABLISHMENT OF SUNDAY SCHOOLS	1294
VI. THE JUVENILIZATION OF PUNISHMENT	1308
VII. EPILOGUE	1317

[†] Assistant Clinical Professor of Law, Boston College Law School. I want to thank David Friedman, Ingrid Hillinger, Adam Hirsch, Joanna Innes, John Langbein, and Avi Soifer for their help and encouragement; John Brewer for his guidance; John Hitt, Lisa Tingle, and Mark Houle for their diligent assistance in research; and the Harvard Center for European Studies and former Dean Daniel Coquillette of the Boston College Law School for their funding.

There is an odd fascination with the birth of the modern prison. As historical moments go, it is a colorless one—gray almost by definition. At that moment a penal scheme marked by fitful bursts of shocking severity gave way to a metered, reasoned response to crime. The old system, with its occasional spectacles of death, designed to deter by memorable example, made for much better drama than the new, quiet methods of confinement, designed to correct by steady persuasion. And yet succeeding generations of penologists and legal historians have returned to this dreary moment as though they would find sealed in the crypts of those first modern prisons the key to understanding our rampant criminal culture or, at the very least, an explanation for why our treatment of crime has gone so far wrong.

In part, no doubt, the hunger to understand the wave of prison building that swept across England in the last decades of the eighteenth century reflects a longing for the innocence of an age in which crime seemed within the community's power to solve. The brash claims of those who built these new prisons that they would avert most future crime seem strangely naive today. In our age, in which the notion of "rehabilitating" criminals is officially,¹ even statutorily,² mocked, one blushes to think that stern law-and-order types once argued that prisons could be the site of a compassionate reeducation of criminals.

Perhaps in search of this lost innocence, the story of the first modern Anglo-American prisons has been endlessly retold. Like all stories that bear retelling, this one has a hero: John Howard, the great prison reformer, who as high sheriff of Bedfordshire descended into dungeons throughout Britain seeking with his lantern an honest keeper and a decent jail. The chronicle of his disappointment, first published as *The State of the Prisons* in 1777, became the manifesto of prison reform. Howard decried the filth of the prisons, the avarice of their keepers, and the neglect of the magistrates who were charged with overseeing both. He made detailed recommendations for the proper running of prisons. And for prisoners committed to houses of correction, which

-
1. The court agrees that this defendant should not be sent to prison for "rehabilitation." Apart from the patent inappositeness of the concept to this individual, this court shares the growing understanding that no one should ever be sent to prison *for rehabilitation*. That is to say, nobody who would not otherwise be locked up should suffer that fate on the incongruous premise that it will be good for him or her. Imprisonment is punishment. Facing the simple reality should help us to be civilized.

United States v. Bergman, 416 F. Supp. 496, 498–99 (S.D.N.Y. 1976); *see also* Sean P. Murphy, *Weld Pushes Releases; In Shift, Governor Eyes Plan for 1,100 County Inmates*, BOSTON GLOBE, July 3, 1992, at 19 (quoting Massachusetts Governor William Weld's opinion that prison "should be like a tour through the circles of hell").

2. In charging the United States Sentencing Commission with the task of prescribing uniform sentencing standards, Congress directed that "[t]he Commission shall insure that the guidelines reflect the inappropriateness of imposing a sentence to a term of imprisonment for the purpose of rehabilitating the defendant" Comprehensive Crime Control Act of 1984, 28 U.S.C. § 994(k) (1988).

proposed to reform the offender, he prescribed a tripartite regimen of solitary reflection,³ piety,⁴ and labor.⁵

Over the next two decades, county authorities in England built at least forty-five "reformed" prisons.⁶ Virtually all bore Howard's mark in either their design (many were by William Blackburn, his favorite architect) or their method of operation. They were the physical, institutional component of what has become known as the "reform" of criminal punishment in late eighteenth-century England. The quotation marks acknowledge that this watershed change in the methods and purposes of criminal punishment has not been hailed by all. But those who built the new prisons surely thought themselves to be engaged in "reform,"⁷ and they worked, for better or worse, a remarkable social change. Inside of a generation, the penal gears of a nation shifted.

The repeated retellings of the story of this reform fall roughly into four genres. In the humanitarian genre, Howard and other reformers are cast as unselfish and compassionate protagonists.⁸ In the mechanistic genre, their ideas find success because of two historical accidents—an epidemic of fever in the nation's jails⁹ and the interruption of transportation by the American War.¹⁰ In the class struggle genre, the reformed prison is made the tool of the

3. "If it be difficult to prevent their being together in the day-time: they should by all means be separated at night. Solitude and silence are favourable to reflection; and may possibly lead them to repentance." JOHN HOWARD, *THE STATE OF THE PRISONS IN ENGLAND AND WALES* 22 (Warrington, William Eyres, 3d ed. 1784) (1777) [hereinafter HOWARD, PRISONS] (footnote omitted). Howard thought that total solitude—both day and night—was unnecessary and severe. See JOHN HOWARD, *AN ACCOUNT OF THE PRINCIPAL LAZARETTOS IN EUROPE* 169 n.* (Warrington, William Eyres 1789) [hereinafter HOWARD, LAZARETTOS].

4. "A Chaplain is necessary [in houses of correction] in every view"—as well as prayers and Bible readings. HOWARD, PRISONS, *supra* note 3, at 40.

5. "This is indispensibly [sic] requisite. *Not one* should be idle, that is not sick. The keeper should be a master of some manufacture. . . . And he should keep his prisoners at work ten hours a day, meal-times included." *Id.* at 38 (footnote omitted).

Some historians dispute that Howard believed prisons could reform criminals and argue that Howard simply wanted prisons to be clean and well run. See, e.g., 1 SEAN MCCONVILLE, *A HISTORY OF ENGLISH PRISON ADMINISTRATION 1750–1877*, at 92–96 (1981). Howard indeed railed against dirty prisons and corrupt jailers, but he just as clearly advocated a prison regimen that could reclaim the prisoner's soul. Other prison reformers cited Howard as authority for the reforming power of the new prisons. See, e.g., SAMUEL CLOWES JR. & THOMAS BUTTERWORTH BAYLEY, *THE REPORT . . . OF THE STATE OF THE HOUSE OF CORRECTION AT MANCHESTER . . . PRESENTED TO THE COURT OF QUARTER SESSIONS passim* (Manchester, J. Harrop 1783) (citing Howard).

6. See ROBIN EVANS, *THE FABRICATION OF VIRTUE* 94 (1982). Between 1785 and 1788 alone, six counties obtained acts of Parliament to rebuild and reorganize their prisons. See SIDNEY WEBB & BEATRICE WEBB, *ENGLISH PRISONS UNDER LOCAL GOVERNMENT* 40 (1922).

7. Thomas Butterworth Bayley, the chief protagonist of this Article, wrote of the "glorious Idea of a Reform of our Penal Laws." Letter from Thomas Butterworth Bayley to the Earl of Clarendon (Jan. 1, 1785), Public Record Office, London [hereinafter P.R.O.] H.O. 42/6; see also GEORGE O. PAUL, *CONSIDERATIONS ON THE DEFECTS OF PRISONS AND THEIR PRESENT SYSTEM OF REGULATION* 5 (London, T. Cadell 1784) ("[B]y Reform I mean nothing less, than a general and entire Correction of the Principle of Prisons . . .").

8. See, e.g., WEBB & WEBB, *supra* note 6, at 32–37. For a contrary opinion of Howard, see Rod Morgan, *Divine Philanthropy: John Howard Reconsidered*, 62 *HISTORY* 388, 388–92 (1977).

9. See, e.g., MARGARET DELACY, *PRISON REFORM IN LANCASHIRE, 1700–1850*, at 79–94 (1986) (focusing on impact of jail fever).

10. See *infra* note 163 and accompanying text.

ruling class, which uses it to impose factory-like discipline on holdouts from factory discipline.¹¹ And in the genre of ideology, Howard's ideas are explained as the natural progeny of the prevailing religious, political, and philosophical strains of his day.¹²

Each of these genres contributes to an understanding of the reform, and throughout this study I will draw from them. I will seek, however, to repair a faulty premise on which each seems to rest. Many studies of these late eighteenth-century prisons have uncritically assumed them to be the direct ancestors of our modern penitentiaries, which confine almost the entire criminal population. These studies attribute to the builders of the early prisons a far-flung ambition—called by some quixotic, by others cynical—to confine the *entire* nonconforming population and to make it conform. If instead we put today's prisons out of our mind, we can tell a different story about these first modern prisons. Their builders did not seek to confine, much less to correct, the whole criminal population, but rather to confine and correct a segment of the population that they thought to be particularly reformable—the young. I will argue here that the prison-building fever of the late eighteenth century was part of a “juvenilization”¹³ of the punishment of minor crime. The penal reformers of this era intended and adapted their new prisons to confront the particular problem of crime by youths. They did so in part because they perceived crime by youths to present a mounting social threat and in part because they believed that the best way to attack all crime was to correct young criminals early on. Only when we recognize this focused ambition of the early prison builders can we explain the basic facts of the late eighteenth-century reform in a fully convincing way.

The facts, reduced by their constant retelling to a series of near clichés, are these: Before the reform, English penal law was a monument to deterrence through fear. Its “Bloody Code” made virtually every felony capital,¹⁴ but felons were in fact rarely executed. Many convicted felons received royal pardons, usually on the advice of the sentencing judge. Many others were

11. See, e.g., GEORG RUSCHE & OTTO KIRCHHEIMER, PUNISHMENT AND SOCIAL STRUCTURE 24–137 (1939); MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON 24, 220–21 (Alan Sheridan trans., 1977) (approving of Rusche and Kirchheimer). Foucault's analysis is far richer than my Marxian slogans would suggest, and he indeed takes pains not to trace the prison's success to a monolithic ruling class. The genres described are rough categories.

12. See, e.g., MICHAEL IGNATIEFF, A JUST MEASURE OF PAIN 44–79 (1978). For an excellent survey of studies of the reform, see Joanna Innes & John Styles, *The Crime Wave: Recent Writing on Crime and Criminal Justice in Eighteenth-Century England*, 25 J. BRIT. STUD. 380 (1986).

13. The term is a bit of an anachronism. The word “juvenile” was not part of the criminal legal culture. See *infra* note 417 and accompanying text.

14. Blackstone decried Parliament's apparent judgment that “no less than an hundred and sixty [crimes are] . . . worthy of instant death.” 4 WILLIAM BLACKSTONE, COMMENTARIES *18.

accorded the "benefit of clergy,"¹⁵ branded on the thumb¹⁶ (so that they could not again claim this "benefit"), and spared. Many of those pardoned, and many who received the benefit of clergy, were "transported" to one of the American colonies. Still, an occasional "wretch" (the term commentators invariably used) was executed, usually after a public procession to the gallows.¹⁷ Minor felons were often whipped, and again the opportunity for spectacle was not lost.

Before the reform, prisons rarely were used to punish criminals. They served mainly to confine debtors, persons awaiting trial, and convicts awaiting execution or transportation. Prisons were dirty and disease-ridden and unsuited for long-term confinement.¹⁸ Because prisons were not secure, prisoners were often kept in irons.¹⁹ Prisoners received no instruction, either religious or vocational, and little attempt was made to separate male prisoners from female, or hardened criminals from first-time offenders.²⁰

The reform brought both new prisons and a new mode of punishment. The prisons, erected between 1775 and 1795, were airy and clean. They operated by fixed sets of highly articulated rules. Walls were high and strong, so chains were used only as an extraordinary punishment. Prisoners had separate cells and slept alone, and different classes of prisoners had separate courts. They were taught the Bible and were put to work at productive trades.²¹ Convicts who would once have been whipped or shipped to America were instead sentenced to the new reformed prisons to be themselves reformed. When whippings were employed, they were less likely to be public and more likely

15. As it developed in the Middle Ages, the benefit of clergy saved clerics from execution. It evolved into a literacy test that operated to spare condemned persons who could read a passage from the Scriptures. In 1706 the literacy test was dropped, and the benefit of clergy thereafter extended to any person convicted for the first time of any capital offense from which the benefit of clergy had not been withdrawn by statute. Blackstone's complaint, *see supra* note 14, was that the benefit had been withdrawn from at least 160 capital offenses. *See* J.M. BEATTIE, *CRIME AND THE COURTS IN ENGLAND 1660-1800*, at 141-46 (1986).

16. In 1779 Parliament abolished branding and prescribed whippings or fines instead. The Penitentiary Act, 1779, 19 Geo. 3, ch. 74. The records of the Lancashire assizes after 1779 nonetheless include many cases in which those receiving the benefit of clergy were ordered to be branded. *See* P.R.O., P.L. 28/3.

17. Executions were a colorful—and not always dignified—event. *See* I LEON RADZINOWICZ, *A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750*, at 165-205 (1948).

18. For a particularly vivid and thorough description of London's prisons before the reform, *see* Wayne J. Sheehan, *The London Prison System, 1666-1795*, at 1-96, 314-17 (1975) (unpublished Ph.D. dissertation, University of Maryland).

19. Wayne Sheehan reports:

The most common leg irons weighed about fifteen pounds and consisted of two ankle bracelets attached to several iron links, each about eighteen inches long. The bracelets were locked around one or both ankles so that when a prisoner had to walk he picked up the links and then shuffled along. Prisoners who were obvious security risks were loaded with irons weighing about forty pounds, or totally immobilized by securing their irons to the floor or walls

Id. at 355-57.

20. Margaret DeLacy has argued that "[t]he unreformed prison has its own history of reform." DELACY, *supra* note 9, at 53. She is right that we must guard against the cliché that all reform began with Howard. She does not dispute, however, that the changes of the reform era were of unprecedented scope.

21. These hallmarks of the 18th-century reformed prisons should not be confused with the extreme regimentation that characterized the "separate" and "silent associated" systems adopted in England and America in the early and mid-19th century. *See* IGNATIEFF, *supra* note 12, at 3-11, 194-200.

to be behind prison walls. Executions became somewhat less common (but the trend was not an even one) and certainly less of a spectacle. Although the Bloody Code remained intact until the early nineteenth century, its detractors grew in numbers and influence. When the Code was finally repealed between 1808 and 1837,²² there was already in place a new ideology of punishment that filled the gap left by the Code's demise.

This sketch allows us to frame four basic questions—the why, how, when, and who of the reform—that any believable retelling must help to answer. First and most basic, why did the reformers turn away from deterrent modes of punishment and embrace a corrective mode? The reformed prison was, after all, a *reforming* prison. Why did the prison builders think that their new structures would have the capacity to change criminals into productive citizens? Second, how could such revolutionary ideas have achieved so broad a victory over so little dissent in so short a time? The reforming tide washed across England. Despite occasional murmurs about the expense of the new prisons,²³ there was hardly a breath of dissent—in an era of vigorous dissent—to the proposition that compassionate confinement in prison could reclaim a criminal. How could this arguably counterintuitive notion find a receptive audience in so many widely separated jurisdictions? Third, why did the reform happen when it did? The new prisons first emerged in the mid-1770's, and the prison building reached its peak a decade later. None of the rhetoric of the reform was new, nor any of its ideas,²⁴ yet it arose in seemingly complete form and almost all at once. Why did the ideas of the reform, floating as dormant spores in the century's ideological winds, suddenly take root and bloom? Finally, how do we explain the character of the reformers, who were largely men of little humor with little sympathy toward criminal behavior? Why did these stern reformers speak the language of crimefighting in such compassionate tones?

Having laid out these questions, I will suggest some answers through a different retelling of the reform. I will set this account in a single community, the town of Manchester in England's industrializing north. The experience of a single town may seem an unlikely source of insights into the roots of a nationwide reform movement, but there are many reasons to seek the secrets of the reform in a single place. The British penal reform of the late eighteenth century may have been a nationwide movement, but it was not a national, centralized movement. The officials who built the new prisons and those whose sentencing practices gave effect to the new ideology of corrective

22. See J.J. TOBIAS, *URBAN CRIME IN VICTORIAN ENGLAND* 202 (1972).

23. Fear of higher taxes drew protests against proposed new prisons in Gloucester in 1780, Sussex in 1786, and Bristol in 1792. See EVANS, *supra* note 6, at 133–34; IGNATIEFF, *supra* note 12, at 98, 234 n.65; see also [SAMUEL DENNE], *A LETTER TO SIR ROBERT LADBROKE* 67–68 (London, J. & W. Oliver 1771) (acknowledging that some might object to solitary confinement of inmates on account of cost).

24. See *infra* notes 188–89 and accompanying text.

punishment were local authorities. The assize judges who rode circuit throughout the country dispensing the King's justice in the most serious of cases had far less to do with the reform than the justices of the peace who presided at the local quarter sessions, where the great bulk of criminal business was done. These local magistrates built the new prisons. Britain had no national penitentiary until 1816, more than a decade after this first movement toward prison reform had come to an end. And although several acts of Parliament passed between 1773 and 1784²⁵ laid out the principles of the reform movement, these acts generally reflected—and rarely directed—the thinking of the local magistrates.

Although it was decentralized, the reform movement was remarkably uniform. The experience of a single community can therefore teach valid lessons about the movement as a whole. No one community could better exemplify the reform than Manchester. In Manchester the social forces that convulsed Britain in the late eighteenth century—rapidly accelerating industrialization, massive immigration into urban centers, deepening social dislocation—operated with special ferocity. In Manchester the pressures these forces put on the old penal institutions were especially urgent, and the resulting changes in those institutions were especially sharp and clear. The local magistrates built a new prison on the Howard/Blackburn model, and they adopted new sentencing practices that reflected the trend away from deterrence and toward correction that characterized the reform nationwide. In Manchester these sentencing trends were especially pronounced, because the town's great distance from the nearest assizes freed local justice from the regularizing influence of the assize judges.

And Manchester is a particularly fruitful place to study the reform because its reforming chief magistrate, Thomas Butterworth Bayley, left clear tracks. Like George Onesiphorus Paul in Gloucestershire, Bayley personally supervised every aspect of criminal prosecution and punishment in the district. He wrote and published less than Paul and far less than Howard, but he freely and frequently stated his opinion of the sources of crime and the ways to cure

25. See 13 Geo. 3, ch. 58 (1773) (authorizing local magistrates to appoint jail chaplains), 14 Geo. 3, ch. 20 (1774) (making it unlawful to collect fees from prisoners after acquittal or in absence of indictment), 14 Geo. 3, ch. 59 (1774) (requiring certain sanitation measures), 22 Geo. 3, ch. 64, § 1 (1782) (mandating separation of prisoners of certain categories and appointment of magistrates to inspect houses of correction), 22 Geo. 3, ch. 64, § 8 (1782) (banning alcohol, unless medically prescribed, in houses of correction), 24 Geo. 3, ch. 54, § 22 (1784) (abolishing tippling, gaming, and selling of liquor in county jails)

By far the most influential parliamentary text was the Penitentiary Act of 1779, 19 Geo. 3, ch. 74, which called for the construction of two "Penitentiary Houses" with capacities of 600 males and 300 females respectively. Those convicted of crimes normally punishable by transportation could be sent instead to the penitentiaries. The act was written by Howard, Sir William Blackstone, and Sir William Eden and explicitly endorsed Howard's regimen of solitary reflection, piety, and labor as a recipe for the reformation of criminals. But as Thomas Butterworth Bayley complained in 1785, the act was "suffered to remain a *dead Letter*." Letter from Thomas Butterworth Bayley to the Earl of Clarendon, *supra* note 7. Millbank, England's first national penitentiary, did not open its doors until 1816. IGNATIEFF, *supra* note 12, at 170

it. The tenets of Bayley's personal reform manifesto survive in court records, his personal correspondence, and the detailed coverage by the town's press.

These sources permit a new retelling of the reform, one in which disease theory and war, ideology and class struggle, play more minor roles in shaping the new penal practices and institutions. In this retelling the new prisons did not take their shape from above, as though their creators had pressed an ideological mold down upon them. Rather the new prisons took their shape from those on whom they pressed down—from the changing identities of those who were prosecuted and confined in prisons. By examining the changing identities of those who were punished, I hope to mark out one new path in the search for the historical sources of this era of prison building. From the evidence in Manchester I will argue that Bayley and his colleagues, as well as others in the reform movement nationwide, undertook to bring more *young* criminals within the scope of penal institutions. Young criminals had formerly enjoyed great impunity, largely because the institutions of punishment were perceived to suit them badly. But in the last decades of the century the conviction took hold that this impunity was a major cause of the system's failure to control crime. One of the commonest clichés of the time was that "*small* crimes lead to *great*"²⁶—that the failure to punish early offenses was the biggest source of major crimes.

A sudden increase in concern with the crimes of youths was not happenstance. It had much to do with the turbulent acceleration of urbanization and industrialization in the latter half of the eighteenth century. The rapid growth of towns was thought to destabilize the social and family structure. Social leaders became obsessed with "vice," the precursor to crime, which they saw thriving in the urban squalor. They embraced the notion that there were "seminaries of vice" in every dark corner of the nation's urban centers, and they thought youths to be particularly vulnerable to such evil instruction. Moreover, collectivized industries, which were propagating at a furious pace, were employing children in ever greater numbers. The conditions of child labor and in particular the separation of working children from their parents caused enormous concern to Bayley and his contemporaries. Public leaders naturally responded with great enthusiasm when Sunday schools emerged in the mid-1780's as a means to educate and moralize child laborers.

Bayley and his counterparts believed that they could help young criminals, but that they had no power to do so because young criminals were rarely exposed to the formal mechanisms of justice. The decision to prosecute was the crime victim's, and magistrates had no power to declare by fiat that the young would be prosecuted. Crime victims were reluctant to bring young criminals to court, in part because they feared the offender would fall victim to the system's occasional fits of excess severity. The pre-reform penal system

26. MANCHESTER MERCURY, Aug. 19, 1788 (editor's comment).

was simply not suited to the punishment of young criminals. It was not equipped to exploit the one characteristic that set young criminals apart from their older, "hardened" counterparts: that they might be more readily reformed.

One solution might have been to create a separate penal mechanism designed to reform young criminals. For reasons I will discuss much later on, such a separation was not contemplated. Instead, Bayley and his contemporaries adapted the entire machinery of criminal prosecution and punishment (at least at the local level, where less serious crimes were punished) to the punishment of youths. They undertook to bring young criminals under the penal umbrella, and as a result they were constrained to suit penal institutions to the punishment of the young. In a sense, the birth of the modern prison and the adoption of a corrective penology in the last decades of the eighteenth century may therefore be cast as a "juvenilization" of the criminal law.

Yet the word "juvenile" was nowhere a part of the rhetoric of the reform, and the reformers did not contemplate a class of juvenile offenders strictly separable according to age from their adult counterparts. Although Bayley and his contemporaries spoke of "young" criminals and those "of tender years," they never said how young "young" was. They employed instead a functional definition of those criminals whom the new prisons would primarily serve as those who were not yet "hardened" in their criminal ways. They conceived the new prisons and the new sentencing practices as the appropriate punishment for early offenders whose still-pliable minds could be reshaped by a corrective program of solitary reflection, piety, and labor.

The concept of juvenile offenders as a distinct class was a product of a later reform, one that followed by several decades the close of this first era of prison reform. The rhetoric that accompanied the birth of this juvenile class was uncannily like the rhetoric of the late eighteenth-century reform movement. But the later outcome was different: The newly delineated class of juvenile delinquents was split off, and new institutions, "reformatory schools," emerged to receive them. The philosophical similarity between the reformed prisons of the late eighteenth century and the reformatory schools of the mid-nineteenth century is no coincidence. They both took their shape from the populations they were to hold. In the case of the reformatory school, that population was explicitly denominated "juvenile." In the case of the reformed prisons of the late eighteenth century, the population was those deemed "reformable." In the pages that follow, I hope to show that these were not two separate movements, but that the reform of the late eighteenth century was an earlier, largely abortive attempt to reconcile the penal system with the need to redress crime by youths. I hope also to explore why an institution that bore so little promise for the correction of older criminals and that was never intended for that task has survived to become the preeminent mode of punishment for the entire criminal population.

I will begin this analysis by setting the scene—by describing Manchester and its penal institutions at the outset of the reform and by briefly exploring Bayley's character. In Part II, I will set out the changes that Bayley and his colleagues worked during the last quarter of the eighteenth century in the mode of criminal punishment in Manchester. As I have suggested, these changes accord with those of the nationwide reform movement and reflect the national trend toward corrective penology. I will show in Part III that Bayley and his contemporaries explicitly recognized the reforming nature of their scheme and knew that success would depend on the reformability of those punished. In Part IV, I will explore how two of the most commonly articulated theories of the genesis of criminality help to explain the faith Bayley and other reformers held in the reformability of criminals. These two theories—that young criminals proceed down a slippery slope from small to greater crime and that criminals learn their evil ways in one of society's many "seminaries of vice"—not only suggest that criminality is a misbegotten habit that can be unlearned, but also support the conclusion that *young* criminals would be most susceptible to change.

I will attempt to show in Part V that the new prominence of this concern with young criminals was a function of other forces rapidly transforming English society.²⁷ The rise of collectivized industries, the migration of pools

27. These forces may have included a new, more empathic and solicitous view of children. According to the classic statement of the thesis by Philippe Ariès, adapted and applied to England most prominently by J.H. Plumb and Lawrence Stone, childhood was not recognized during the Middle Ages as a distinct developmental stage. See PHILIPPE ARIÈS, *CENTURIES OF CHILDHOOD* (Robert Baldick trans., Vintage Books 1962); LAWRENCE STONE, *THE FAMILY, SEX AND MARRIAGE IN ENGLAND: 1500-1800* (1977); J.H. Plumb, *The New World of Children in Eighteenth-Century England*, 67 *PAST & PRESENT* 64-93 (1975). But see LINDA A. POLLOCK, *FORGOTTEN CHILDREN* 1-67, 262-71 (1983) (summarizing and criticizing Ariès thesis and its progeny). Ariès and others stake this conclusion to varying degrees on changes in portraiture, which early on depicted children as miniature adults bearing small adult facial and body features; on the lack of children's clothes, games, toys, and literature; on the prevalence of wet-nursing out of the home; and on other evidence of disinterest shown by parents to their offspring. See ARIÈS, *supra*, at 33-38 (paintings), 50-61, 129 (clothes), 62-99 (toys); STONE, *supra*, at 426-32 (wet-nursing); Plumb, *supra*, at 90-91 (clothes), 86-90 (toys and games), 81-85 (literature). Ariès, Stone, and many who embrace their broad conclusions trace parental apathy most directly to the high infant mortality of earlier times. Not until children reliably survived infancy, they argue, could parents risk an emotional commitment to them. See ARIÈS, *supra*, at 38-40; STONE, *supra*, at 651-52; see also DAVID HUNT, *PARENTS AND CHILDREN IN HISTORY* 185-86 (1970).

During the 17th and 18th centuries, the argument goes, infant mortality fell, capitalism arose, and parents began to lavish attention and goods on their children. See STONE, *supra*, at 477, 651-52 (discussing infant mortality and its decline beginning in 18th century); Plumb, *supra*, at 80-91 (focusing on rise of capitalism). Children's clothing, books, toys, and literature appeared. See ARIÈS, *supra*, at 50-61; STONE, *supra*, at 410-11; Plumb, *supra*, at 81-91. More emphasis was placed on education. See ARIÈS, *supra*, at 37-38. Parent-child relations became more affectionate, and parental discipline grew less harsh. See STONE, *supra*, at 167, 170, 436; Plumb, *supra*, at 70; Kathryn Sather, *Sixteenth and Seventeenth Century Child-Rearing: A Matter of Discipline*, 22 *J. SOC. HIST.* 735, 735-43 (1989) (focusing on somewhat earlier time frame, but reaching similar conclusions). But see RANDOLPH TRUMBACH, *THE RISE OF THE EGALITARIAN FAMILY* 244 (1978) (agreeing that parent-child relations grew warmer in 18th century, but arguing that discipline remained harsh).

Although it would be tempting to build upon the broad and rich conclusions of the social historians of children, to do so would be imprudent given the empirical sand on which their arguments stand. One cannot, after all, quantify changing societal attitudes toward children. Other historians have found many

of child laborers, the breakup of families, and the consequent absence of moral guidance in the upbringing of many of the nation's children combined to convince Bayley and those of like mind that the seeds of criminality were being sown in young minds and that early corrective measures were the best remedy. The explosive rise of Sunday schools in the mid-1780's was a product of this concern. In Part VI, I will address the absence of any evidence of the ages of criminal defendants in Manchester or (with one narrow exception) elsewhere in Britain and will examine other evidence that documents the reformers' particular focus on the problem of young criminals. I will argue that Bayley and other prison reformers of the late eighteenth century, by molding the nature of imprisonment to suit the needs of young criminals, "juvenilized" the criminal justice system as it applied to minor offenses. Finally, in Part VII, I will suggest that the themes of the late eighteenth-century reform movement emerged again in the early to mid-nineteenth century to inspire a more age-specific alteration of the criminal law.

I. THE TOWN, ITS CRIME, ITS COURTS, AND JUSTICE BAYLEY

A 1751 map of Manchester gives little hint of the boom to come. Arrayed around Christ Church, prominently pictured at the center of town, are a few indifferently laid out streets. Irregular blocks quickly melt into open fields. On the banks of one of the town's two rivers, the Manchester House of Correction is depicted as a simple structure with a single open courtyard.

A map of 1793 is startlingly different.²⁸ Long parallel streets have carved open fields into uniform rectangles. Christ Church is now one of several large buildings that include a workhouse, an infirmary, and Richard Arkwright's new

counterexamples to the Ariès thesis in the form of diaries or autobiographies telling of nurturing, devoted parents before the 18th century. See, e.g., ALAN MACFARLANE, *THE FAMILY LIFE OF RALPH JOSSELYN* (1970); POLLOCK, *supra*, at 69–271; KEITH WRIGHTSON, *ENGLISH SOCIETY: 1580–1680*, at 108–18 (1982). Barbara Hanawalt has found some evidence of children's games in medieval sources. See Barbara Hanawalt, *Childrearing Among the Lower Classes of Late Medieval England*, 8 J. INTERDISCIPLINARY HIST. 1, 18 (1977); accord Jerome Kroll, *The Concept of Childhood in the Middle Ages*, 13 J. HIST. BEHAVIORAL SCI. 384, 384–93 (1977) (finding early evidence of concept of childhood). Several studies have ridiculed the use of portraiture as evidence of attitudes toward children. See, e.g., POLLOCK, *supra*, at 46–48 (citing other critics). Linda Pollock has disputed evidence of a sharply falling infant mortality rate. See *id.* at 51. And as she and Keith Wrightson argue, a high risk of early death could as well have moved parents to greater solicitude toward their children. See *id.*; WRIGHTSON, *supra*, at 108–10.

The criticism of Ariès, Stone, and their followers has been unusually frank. The whole area, Pollock writes, "bears the hallmark of sloppiness." POLLOCK, *supra*, at 263. She rejects the notion of a transformation of the view of children in the 18th century as "a myth brought about by over-hasty reading, a burning desire to find material to support the thesis and a wilful misinterpretation of evidence." *Id.* at 271. Wrightson alleges "unwarranted presumption," "dubious inferences," "interpretive fertility," "unsubstantiated hypothesis," and "flimsy foundations." WRIGHTSON, *supra*, at 107, 118.

My own thesis does not rise or fall on the outcome of this debate. I argue that the late 18th-century reformers grew more concerned with crime by youths not because their perception of youth changed, but because they perceived more crime by youths due in part to the migration of ungoverned children to the nation's burgeoning cotton mills.

28. Both maps were reprinted by the Manchester Cultural Committee in 1969.

steam-powered spinning mill, which stands only blocks from the church. The house of correction is now dwarfed by the New Bayley Prison, a cross-shaped structure that occupies an entire oversized city block.

In the intervening years, the town's population tripled.²⁹ Thomas Percival, a local physician, multipurpose scientist, and friend of Bayley, attributed the town's rapid growth to "the astonishing and sudden increase of the cotton manufactory."³⁰ Industry brought its benefits. A local magistrate observed that common laborers were insisting on wheat bread and tea and were no longer contented with simpler foods.³¹ The town had a theater, a concert room, and a literary society and came to fancy itself graced with "the style and manners of one of the commercial capitals of Europe."³² But prosperity was neither costless nor uniform. With laborers streaming into town, Bayley was moved to complain that the cotton trade had "its attendant evils" and that among these was "a very numerous and *foreign* population (especially from Ireland), estranged, unconnected, and in general composed of persons who are in a species of exile."³³ A second attendant evil, noted by physician and local historian John Aikin in 1795, was the "closeness with which the poor are

29. Following are population figures for Manchester and its sister town, Salford:

Year	Population
1757	19,839
1773	27,246
1783	39,235
1788	greater than 50,000
1801	90,399

TABLE 1. *Population of Manchester and Salford*

THOMAS PERCIVAL, OBSERVATIONS ON THE STATE OF POPULATION IN MANCHESTER 1-3, app. at 63 (1789), reprinted in POPULATION AND DISEASE IN EARLY INDUSTRIAL ENGLAND (1973); 2 THE VICTORIA HISTORY OF THE COUNTY OF LANCASTER 349 (photo. reprint 1991) (William Farrer & J. Brownbill eds., 1908) [hereinafter VICTORIA HISTORY]. Only the 1801 figure represents an actual census count. The 1773 figure resulted from a survey executed "with great care and accuracy." PERCIVAL, *supra*, at 2. The other figures are estimates either made or quoted by Percival.

For purposes of comparison: During the latter half of the century, the population of England and Wales grew only from about 6.5 million to 8.75 million. FRANÇOIS VIGIER, CHANGE AND APATHY 17 (1970).

30. PERCIVAL, *supra* note 29, app. at 63.

31. See ALFRED P. WADSWORTH & JULIA DE LACY MANN, THE COTTON TRADE AND INDUSTRIAL LANCASHIRE 1600-1780, at 390-91 (1931) (quoting Dorning Rasbotham).

32. JOHN AIKIN, A DESCRIPTION OF THE COUNTRY FROM THIRTY TO FORTY MILES ROUND MANCHESTER 184 (London, Kelley 1968) (1795).

33. Letter from Bayley and Henry Norris to Henry Dundas (July 19, 1791), P.R.O., H.O. 42/6, quoted in JOHN BOHSTEDT, RIOTS AND COMMUNITY POLITICS IN ENGLAND AND WALES 1790-1810, at 72 (1983). Bayley complained that Manchester's Irish population was "'full of money,' drunken, and riotous." LEON S. MARSHALL, THE DEVELOPMENT OF PUBLIC OPINION IN MANCHESTER, 1780-1820, at 120 (1946).

crowded in offensive, dark, damp, and incommensurable habitations."³⁴ A third was child labor. Bayley and other social leaders worried that factory children, dormitoried at the mills away from parents and moral authorities, would school each other in vice and crime—a worry, as I will argue in Part V, that helped propel the prison reform movement.

A fourth was crime. There is no good way to measure Manchester's crime rate in this period. The town had no police force and no mechanism for reporting crimes. Urbanization seems to bring crime in its wake,³⁵ and Manchester can have been no exception. Repeated complaints of the "enormous,"³⁶ "amazing,"³⁷ "alarming,"³⁸ and "truly alarming"³⁹ increase of crime were surely part of the talk-radio rhetoric of the time, but no doubt reflected a perceived reality as well.⁴⁰ The town's growing textile manufacturers appear to have been endlessly victimized by theft. Many were involved in bleaching and dyeing cloth, a process that required spreading the fabric outdoors, where it would be particularly vulnerable to thieves. But ordinary persons were also crime victims. A typical list of theft crimes prosecuted in the town includes not only various quantities of unfinished cloth, but also handkerchiefs, a shirt, books, a watch, and a petticoat.⁴¹

There were four formal forums for the redress of crime. First, the manorial court leet,⁴² which had the power to impose only fines, took jurisdiction of public offenses such as obstructing streets, failing to control dangerous animals, keeping a brothel, selling spoiled meat, and using false weights and

34. AIKIN, *supra* note 32, at 192. Aikin cited a study by Manchester physician John Fernar, who concluded that living in damp cellars and blind alleys was responsible for a high incidence of rheumatism, paralysis, consumption, distortion, and idiocy among the town's poor. *Id.* at 192 & n.* As early as 1774, Thomas Percival noted that Manchester had 5317 families and only 3402 houses. PERCIVAL, *supra* note 29, at 2.

35. This phenomenon has been noted at least since 1785, when William Paley wrote that large cities afford criminals shelter from detection and foster the formation of gangs. See WILLIAM PALEY, *THE PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY* 350 (Boston, West & Richardson 1818) (1785).

36. Richard Townley, Letter to the Editor, *MANCHESTER MERCURY*, Mar. 21, 1775.

37. *Order of Manchester Court of Quarter Sessions, Feb. 17, 1785*, *MANCHESTER MERCURY*, Feb. 22, 1785.

38. *Order of General Quarter Sessions of the Peace for the County of Lancaster, July 20, 1786*, *MANCHESTER MERCURY*, Aug. 8, 1786; *Order of General Quarter Sessions of the Peace at Pontefract, Apr. 24, 1786*, *MANCHESTER MERCURY*, May 8, 1787; *MANCHESTER MERCURY*, Nov. 17, 1789; *MANCHESTER MERCURY*, May 11, 1790.

39. *MANCHESTER MERCURY*, Jan. 11, 1774; *MANCHESTER MERCURY*, Apr. 8, 1783; *MANCHESTER MERCURY*, Mar. 30, 1790. Samuel Denne warned against taking such rhetoric too seriously. Some people, he said, when speaking about crime, "peremptorily . . . avow that the times, into which they are unhappily cast, are infinitely worse than the preceding." (DENNE), *supra* note 23, at 3–4.

40. It is interesting, though hardly conclusive of anything, that such rhetoric seems to have been scarce during the years of the American War, 1775–1781, before the great growth in crime following the soldiers' return. See *infra* notes 191–93 and accompanying text.

41. See Lancashire County Record Office, Preston, Quarter Sessions Order Books [hereinafter L.C.R.O., QSO]/2 155 (Summer 1786).

42. By the end of the 18th century, Manchester had nearly surpassed Liverpool as the largest urban center in Lancashire, see 2 VICTORIA HISTORY, *supra* note 29, at 348–49, yet it remained a manorial village until 1838, see VIGIER, *supra* note 29, at 4.

measures.⁴³ Second, justices of the peace acting by summary jurisdiction heard a variety of minor offenses such as being a disorderly person or vagabond, poaching, and deserting one's family. The charges most frequently brought before the justices in summary session concerned workers who had left the service of their masters.⁴⁴ Third, the court of quarter sessions sat four times annually in Manchester and tried all serious crimes not punishable by death.⁴⁵ The court's jurisdiction was Salford Hundred, Salford being one of six "hundreds" in Lancashire (not to be confused with the town of Salford, which was virtually part of Manchester). Manchester was by far the largest town in Salford Hundred and accounted for the great bulk of cases tried at the Salford Quarter Sessions. Finally, the assizes of Lancaster took jurisdiction over all capital felonies—murder, manslaughter, rape, forgery, burglary, robbery, horse theft, and other forms of theft deemed sufficiently serious to warrant death—as well as the occasional misdemeanor and noncapital felony.

Of all these institutions, the assizes held the greatest power over the public imagination. With great fanfare the King's justices rode twice yearly into Lancaster and presided over the most celebrated trials. The awesome power of the assize judges to dispense death or recommend mercy gave them a monopoly on the great spectacles of justice.⁴⁶ And yet the Salford Quarter Sessions had a far broader influence on the nature of criminal punishment in Manchester in the late eighteenth century. Lancaster lies fifty miles to the northwest of Manchester, and in part because of the "very great Expence"⁴⁷ of prosecuting cases there, criminal justice in Manchester was remarkably independent of the Crown. Crime victims had to bear the expense of prosecution in the first instance⁴⁸ and therefore had strong incentive to prosecute locally if at all.

43. WILLIAM ROBERTS, *A CHARGE TO THE GRAND JURY OF THE COURT LEET FOR THE MANOR OF MANCHESTER* 18–19, 21–23 (London, Whieldon and Butterworth, 2d ed. 1793).

44. By an act of Parliament of 1749, 22 Geo. 2, ch. 27, § 9, any out-worker who took up the work of a second master before completing that of the first was liable for one month's imprisonment. By an act of 1777, 17 Geo. 3, ch. 56, § 8, a laborer who "neglect[ed] or refuse[d]" to work on eight successive days was subject to imprisonment for one to three months. My conclusion that such offenses constituted the majority of crimes heard by the justices in summary jurisdiction is based on a sampling of Manchester Prison Calendars, Lancashire County Record Office, Preston, Quarter Session Books [hereinafter L.C.R.O., QSB]/1, at 379–447, which appear to be the only surviving record of summary adjudications in Manchester during this period.

45. The quarter sessions were competent to try all felonies, but generally remitted capital felonies to the assizes. 4 WILLIAM BLACKSTONE, *COMMENTARIES* *271.

46. See generally Douglas Hay, *Property, Authority and the Criminal Law*, in *ALBION'S FATAL TREE* 17–63 (Douglas Hay et al. eds., 1975) (exploring criminal law as ideological system and describing its majesty, justice, and mercy).

47. This complaint of Richard Townley, a colleague of Bayley on the Salford bench, appeared in *The Manchester Mercury* of March 21, 1775. See Townley, *supra* note 36. In 1798, Manchester's constables spent an astonishing 65£ 3s. to transport eight witnesses to and from the assizes. Manchester Constables' Reports (1978) (unpublished document, on file with Manchester Central Library).

48. Parliament established substantial rewards for the successful prosecution of serious crimes, see BEATTIE, *supra* note 15, at 52, and also provided for the reimbursement of expenses to prosecutors. Regarding reimbursement, see *infra* notes 53–58 and accompanying text.

But even the great expense of prosecuting cases at the assizes cannot explain how rarely Manchester's crime victims chose to bring cases there. By the end of our period, the Salford Quarter Sessions accounted for more than ninety percent of criminal convictions in cases arising in Salford Hundred:

Time Period	1774-75	1781-82	1786-87	1791-92	1796-97
# Convictions at the Lancaster Assizes	9	16	12	17	21
% of Total	14.1	21.1	9.5	9.3	9.5
# Convictions at the Salford Quarter Sess.	55	60	114	165	199
% of Total	85.9	78.9	90.5	90.7	90.5

TABLE 2. *Convictions of Crimes Committed in Salford Hundred*⁴⁹

This apparent diminution of the relative importance of the assizes is not a statistical illusion. A week before the commencement of the August assizes in 1787, Lord Liverpool wrote to Lord Loughborough, the presiding justice: "I am glad to hear that . . . in consequence of the activity of the magistrates this populous county of Lancaster affords so few offences to try."⁵⁰

Lord Liverpool was speaking at least in part of the activity of Bayley and his colleagues on the Salford bench. It is unclear whether the Salford bench was merely energetic or indeed expansionist, but one can count at least four ways in which Bayley and the Salford bench strove to make the quarter sessions an accessible and pleasant place for prosecutors to do business—and especially for prosecutors who were the victims of property crimes. First, Bayley traveled to London in 1782 and successfully lobbied Parliament for an act that would, in most instances, give the quarter sessions jurisdiction over the crime of receiving stolen goods. That crime had formerly been a felony over

49. See L.C.R.O., QSO/2, *supra* note 41, at 143-66; P.R.O., P.L. 28/3 & 4 (Crown Office Minute Books). This table represents only *convictions*, as opposed to crimes charged, because the poor condition of the indictment rolls for Salford Hundred has made it impossible to count the crimes charged (Indictments from the Lancaster Assizes are in excellent condition.) Judging impressionistically from accounts in *The Manchester Mercury*, I believe that the rate of convictions at the Salford Quarter Sessions was quite high and apparently higher than that at the assizes. To that extent, this table understates the relative importance of the assizes. That effect, I hope, is counterbalanced by another: It was impossible to determine where many of the crimes tried at the assizes were committed. When the record left me in doubt, I have assumed the crime took place in Salford and not in another of Lancashire's six hundreds—thereby overstating the relative importance of the assizes.

This table, like most of those to follow, presents totals from five biannual samples

50. Letter from Lord Liverpool to Lord Loughborough (Aug. 10, 1787) (Liverpool Papers, B M Add MS 38310, fol. 4). I am grateful to Michael Collinge for this reference.

which the assizes had exclusive jurisdiction.⁵¹ Although important symbolically, this change was of small practical consequence, as prosecutions for receiving stolen property remained rare. Of far greater significance was the unusual generosity shown by the Salford bench in reimbursing victims of theft for the expense of prosecution. Such reimbursements were authorized by Parliament, which in 1778 extended them even to unsuccessful prosecutors.⁵² The Salford bench made no reimbursement except in theft cases, but in such cases it made reimbursements freely:

Time Period	1774-75	1781-82	1786-87	1791-92	1796-97
# of Persons Convicted of Petty Larceny	41	47	110	140	174
# of Reimbursements Ordered	36	47	131	191	208
Average Reimbursement (£-s.-d.)	4-9-11	5-8-3	4-8-1	4-7-10	5-6-2

TABLE 3. *Reimbursements Ordered at the Salford Quarter Sessions*⁵³

Reimbursements by the Salford bench averaged about five pounds per prosecution, quite a sum in light of J.M. Beattie's finding at the Surrey Quarter Sessions of 1767 that reimbursements never exceeded one guinea.⁵⁴

Records of reimbursements at the Salford Quarter Sessions point to a third way in which the Salford bench made prosecuting cases in that court more convenient. In the earlier years of our period, most reimbursements were made to private citizens,⁵⁵ who therefore appear to have prosecuted cases on their own and without the assistance of counsel. By 1786, however, a cadre of perhaps a dozen attorneys, most of whom served as clerks to the justices, received most of the reimbursements.⁵⁶ By 1796, one such attorney, Nathaniel

51. Bayley's colleague Richard Townley complained of this defect in the law in *The Manchester Mercury* of March 21, 1775. See Townley, *supra* note 36. The old law, 3 & 4 W. & M., ch. 9, § 4 (1691), had an additional defect in that the receiver could not be prosecuted at all until the thief had first been convicted of grand larceny. The fruit of Bayley's lobbying is 22 Geo. 3, ch. 58 (1782). He was also successful in arguing for an act that made it a capital offense to destroy certain cloths in the loom. See 22 Geo. 3, ch. 40 (1782); *MANCHESTER MERCURY*, Dec. 31, 1782.

52. See 18 Geo. 3, ch. 19, § 7 (1778).

53. L.C.R.O., QSO/2, *supra* note 41, at 143-66.

54. BEATTIE, *supra* note 15, at 46. A guinea was 21 shillings. There were 12 pence (12d.) to a shilling and 20 shillings (20s.) to a pound (1£).

55. The great number of different names, including women's names, among those receiving reimbursements leads me to the conclusion that the recipients were not attorneys.

56. Attorneys' and justices' clerks are identified in LEWIS'S MANCHESTER AND SALFORD DIRECTORY 1788 (photo. reprint 1984) (1788) [hereinafter LEWIS'S MANCHESTER DIRECTORY].

Milne, had become clerk to Bayley and six other justices and was receiving over eighty percent of the reimbursements made by the bench.⁵⁷ He was "employed in almost every criminal prosecution" before the court.⁵⁸ Milne's effectual appointment as public prosecutor of Salford Hundred⁵⁹ was an institutional advance generations ahead of its time.⁶⁰ Although one could—and some did⁶¹—find corrupt potential in the funneling of judicial business to the justices' clerk, it is likely that crime victims valued Milne's accessibility to them, his access to the justices, and his consequent

57. See THOMAS BATTYE, *THE RED BASIL BOOK* 58* (Manchester, Hoffer & Graham 1797). LEWIS'S MANCHESTER DIRECTORY, *supra* note 56, at 2. The Quarter Sessions Order Books, L.C.R.O., QSO/2, *supra* note 41, at 143–66, reveal that Milne took the following percentages of all reimbursements ordered by the court:

Time Period	Percentage of Reimbursements
1774–75	0
1781–82	4.3
1786–87	47.3
1791–92	53.9
1796–97	83.2

TABLE 4. *Percentage of the Reimbursements Ordered at the Salford Quarter Sessions that Were Collected by Nathaniel Milne*

58. BATTYE, *supra* note 57, at 58*.

59. One of Bayley's closest colleagues on the Salford bench, Samuel Clowes, seems to have been endorsing the idea of a public prosecutor when he wrote in 1791 that "the prosecuting Felons at the public Expence would be [among] the most effectual Means of suppressing Villainy." Letter from Samuel Clowes to Lord Liverpool (Dec. 5, 1791) (258 Liverpool Papers, Duchy of Lancaster Papers 1790–94, B M Add MS 38447, fol. 148).

60. Public prosecutors were not adopted in England until 1879 and then only in a limited form. See 42 & 43 Vict., ch. 22 (1879); Philip B. Kurland & D.W.M. Waters, *Public Prosecutions in England, 1854–79: An Essay in English Legislative History*, 1959 DUKE L.J. 493, 550–62. By the mid-19th century, justices' clerks often served as semiofficial prosecutors. Douglas Hay & Francis Snyder, *Using the Criminal Law, 1750–1850: Policing, Private Prosecution, and the State*, in *POLICING AND PROSECUTION IN BRITAIN 1750–1850*, at 3, 43 (Douglas Hay & Francis Snyder eds., 1989).

61. Local critic Thomas Battye certainly found fault. He cited the following statement by Lord Kenyon, made during the prosecution of a magistrate who attempted to compel the employment of his clerk as counsel:

"I understand that in some distant parts of the country, magistrates recommend their clerks as persons for carrying on criminal prosecutions, and that in a manner not to be resisted . . . [T]his is using very improper conduct—magistrates themselves are prohibited from acting as solicitors or counsel in carrying on prosecutions, and I think it a fair construction of the law, the prohibition ought to extend to their clerks."

BATTYE, *supra* note 57, at 58*–59*. Battye's complaint apparently had some effect, though not all he had intended. In *The Red Basil Book*, published in 1797, he noted that as a result of "one of [Battye's] former publications" Milne had stopped "pleading publicly in such capacity." *Id.* at 57*–58*. Indeed, in 1795, Bayley and his colleagues had signed a directive that clerks "shall not act as Advocates or Solicitors in any Matter brought before the Magistrates." MANCHESTER MERCURY, Feb. 17, 1795. Apparently, Milne had resigned as clerk to the justices. He certainly had not stopped handling prosecutions; at least through 1797, Milne continued to take the lion's share of reimbursements.

effectiveness. After all, Milne's fees apparently came not from the victims, but from the justices in the form of reimbursements.

These reimbursements, as I have said, were made only in cases of theft. Only one theft crime—petty larceny—was tried at the Salford Quarter Sessions, and that crime accounted for about three-quarters of all criminal convictions handed down at the quarter sessions.⁶² The definition of petty larceny points to the fourth way in which the justices made it easier to prosecute property crime at the Salford Quarter Sessions. Petty larceny was the simple theft of goods valued at a shilling or less. Theft of goods valued at more than a shilling was grand larceny.⁶³ As the maximum punishment for both of these crimes was seven years' transportation,⁶⁴ the distinction was of little consequence to the defendant. To the victim, however, a judgment that the item taken was worth more than a shilling could cost time, money, and aggravation, because grand larceny had to be tried at the assizes.⁶⁵ For that reason the justices tolerated the undervaluation of goods in indictments, a practice that must have been awkward when the item taken was cash with a face value greater than a shilling.⁶⁶

62.

Time Period	1774-75	1781-82	1786-87	1791-92	1796-97
# Convictions	55	60	114	165	199
# Convictions of Petty Larceny	40	42	95	129	161
% Same	72.7	70.0	83.3	78.2	80.9

TABLE 5. *Convictions Found at the Salford Quarter Sessions*

Of the remaining convictions, about 10% were in cases of assault, a misdemeanor. A miscellany of offenses—receiving stolen goods, keeping a bawdy house, nonpayment of bastard support, leaving one's family chargeable, rioting, and others—made up the balance. See L.C.R.O., QSO/2, *supra* note 41, at 143-66.

63. For the definition of these crimes at common law, see 1 RADZINOWICZ, *supra* note 17, at 632. It is not easy to give contemporary significance to these money values. In 1795 the average weekly wage of an adult male doing manufacturing work in Manchester was reportedly 16s. 2 FREDERICK M. EDEN, *THE STATE OF THE POOR* 357 (London, J. Davis 1797). Some sample indictments from the Salford Quarter Sessions value a game cock at 3d., a shirt at 11d., and a hen, a petticoat, and a handkerchief at 6d. each. See L.C.R.O., QSO/2, *supra* note 41, at 155 (Summer 1786).

64. See 4 Geo. 1, ch. 11, § 1 (1717).

65. This jurisdictional limitation was by policy, apparently, and not by law, as courts of quarter sessions were competent to try all felonies. 4 WILLIAM BLACKSTONE, *COMMENTARIES* *270-71. I noted only a single instance of grand larceny, called such, tried at the Salford Quarter Sessions. That was a theft of cloth valued at 13d., and it strikes me as an anomaly. See L.C.R.O., QSO/2, *supra* note 41, at 161 (Fall 1792).

66. Reports in *The Manchester Mercury* reveal many such cases. See, e.g., MANCHESTER MERCURY, Apr. 26, 1774 (10 guineas); MANCHESTER MERCURY, July 27, 1779 (9 guineas in gold and 3£ 14s. in silver); MANCHESTER MERCURY, July 27, 1784 (10 guineas); MANCHESTER MERCURY, July 25, 1786 (11 guineas); MANCHESTER MERCURY, July 24, 1787 (10 guineas); MANCHESTER MERCURY, April 15, 1788 (70 guineas); MANCHESTER MERCURY, July 28, 1789 (15 guineas); MANCHESTER MERCURY, May 17, 1791 (5 guineas); MANCHESTER MERCURY, Apr. 28, 1795 (over 5 guineas). Note that in the most extreme of these cases, the theft of 70 guineas, the value of the goods stolen was almost 1500 times the definitional limit of petty larceny. Beattie cites similar examples of fictitious valuations in Surrey and Sussex before

Through these various devices the Salford justices succeeded in making their court the court of first resort for prosecution of all but the most serious offenses against property. If house breaking, horse theft, and highway robbery are excluded, the quarter sessions accounted for almost ninety-eight percent of convictions of theft crimes arising in Salford Hundred during our period. This remarkable figure⁶⁷ suggests that the magistrates of the Salford bench had an extraordinary degree of control over the nature of criminal punishment of property offenses (and indeed of all offenses⁶⁸) in their jurisdiction. That the business of their court focused heavily on minor property crimes has particular relevance to this study, because minor theft was in this era, as it is today, the first crime of many young offenders. By absorbing into their court almost the entire business of trying minor theft crimes, the justices ensured that an activist magistrate with a progressive vision would have a free hand in working a reform of criminal punishment in Manchester.

Bayley was such a magistrate.⁶⁹ He served on the Salford bench from 1766, when he was just 22, until his death in 1802. Throughout that time he was its dominant influence.⁷⁰ His privileged background, tinged by radicalism, was typical of the magistrates who led the reform movement nationwide. Like George Onesiphorus Paul, the architect of prison reform in Gloucestershire, Bayley was the son of textile manufacturers whose success permitted him to put aside industry in favor of the life of the landed gentry.⁷¹

1752. BEATTIE, *supra* note 15, at 183 & n.92, 285. In that year, magistrates at the Surrey Quarter Sessions began openly handling grand larceny cases. *Id.* at 286.

For a more thorough discussion of how victims (and juries) downvalued larceny charges, see John H. Langbein, *Shaping the Eighteenth-Century Criminal Trial: A View from the Ryder Sources*, 50 U CHI L. REV. 1, 47–55 (1983).

67. By comparison, J.M. Beattie found in his study of Surrey and Sussex that the assizes accounted for about 30% of simple (petty and grand) larceny cases between 1750 and 1802. BEATTIE, *supra* note 15, at 284. Beattie suggests that in Sussex, though not in Surrey, the balance of cases tilted sharply toward the quarter sessions at the end of the century. *Id.* at 607. Peter King reports that in Essex roughly two-thirds of property crime indictments were brought at the assizes. P.J.R. King, *Prosecution Associations and Their Impact in Eighteenth-Century Essex*, in *POLICING AND PROSECUTION IN BRITAIN 1750–1850*, *supra* note 60, at 194.

68. Their monopoly of punishment of violent offenses was not less complete, only less significant. Although the most serious offenses against the person—murder, manslaughter, rape, and assault to rape—were taken to the assizes, assault (which seems to have comprehended the various forms of assault and battery) was almost invariably prosecuted at the quarter sessions. But assault, a misdemeanor, accounted for only about 10% of all convictions at the quarter sessions and does not seem to have been a focus of concern either in Manchester or nationally.

69. On Bayley, see Ernest Axon, *The Bayley Family of Manchester and Hope*, 7 *TRANSACTIONS OF THE LANCASHIRE & CHESHIRE ANTIQUARIAN SOCIETY* 193 (Manchester, Manchester Press Co 1889), THOMAS PERCIVAL, *BIOGRAPHICAL MEMOIRS OF THE LATE THOMAS BUTTERWORTH BAYLEY, ESQ.* (Manchester, W. Shelmerdine & Co. 1802); DELACY, *supra* note 9, at 70–73.

70. Beginning at least in the 1770's and until 1791, Bayley alternated chairmanship of the quarter sessions with fellow magistrate Dornig Rasbotham. After Rasbotham's death in 1791, Bayley assumed the chairmanship permanently. See Letter from Thomas Butterworth Bayley to Lord Liverpool (Nov. 24, 1791) (258 Liverpool Papers, Duchy of Lancaster Papers 1790–94, B.M. Add. MS 38447, fol. 144).

71. See E.A.L. Moir, *Sir George Onesiphorus Paul*, in *GLOUCESTERSHIRE STUDIES* 195, 195–96, 198 (H.P.R. Finberg ed., 1957); WADSWORTH & MANN, *supra* note 31, at 243.

Like Paul, who attended Oxford,⁷² Bayley was handsomely educated. At Edinburgh he took on the liberal leanings that would lead him to embrace abolitionism,⁷³ propose to Wilkes' daughter,⁷⁴ and become a member of the Society of the Supporters of the Bill of Rights.⁷⁵ But too much might be made of Bayley's liberalism. Though a Whig, he was a "whig of the old school; devoted to the established principles of the British Constitution," and though a Dissenter, he was "cordially attached" to the church of England.⁷⁶

Bayley's character shows that odd mixture of self-conscious compassion and stern asceticism that marked the reformers as a class. He spoke feelingly of the plight of the disadvantaged and appeared prominently on the list of sponsors of almost every charitable initiative undertaken in our period. He held that the "Penal Law is a system of charity to prevent crimes; not of malice to destroy offenders."⁷⁷ But he also radiated a rectitude that some of his townspeople took as righteousness. One observer mocked the "self importance in his om'nous face,"⁷⁸ while another described "*his Worship*" this way:

72. See Moir, *supra* note 71, at 196.

73. Bayley was a member of and contributor to Manchester's abolition committee. See PERCIVAL, *supra* note 69, at 8; MANCHESTER MERCURY, Jan. 1, 1788; MANCHESTER MERCURY, Jan. 20, 1789; MANCHESTER MERCURY, Mar. 27, 1792.

74. See DELACY, *supra* note 9, at 71. Margaret DeLacy writes that "[t]hroughout his life, Bayley remained faithful to the Wilkite principles of his youth." *Id.* She thanks Joanna Innes for the information that Bayley had proposed to Wilkes' daughter, but gives no cite for Bayley's later adherence to Wilkite principles. *Id.* at 71, 240 n.2. It is true that the "four main th mes" of the Wilkite view of the law, as identified by John Brewer, have arguable relevance to Bayley's reforming spirit on the bench. These were: (1) the demand for accountability of public officials; (2) the demand for impartial justice; (3) the insistence on due process of law; and (4) the emphasis on government by consent, not force. See John Brewer, *The Wilkites and the Law, 1763-74: A Study of Radical Notions of Governance*, in AN UNGOVERNABLE PEOPLE 128, 136 (John Brewer & John Styles eds., 1980). Moreover, the Wilkites hated trading justices, *see id.* at 145, 165, as did Bayley, *see infra* notes 86-90 and accompanying text. Still, it seems hard to conclude from this evidence much more than that Bayley may have been a radical in his youth and that he later remained loyal to his early reformist ideals, which in themselves were hardly radical.

75. See DELACY, *supra* note 9, at 71.

76. PERCIVAL, *supra* note 69, at 10-11. Michael Collinge has told me that Bayley became a member of the Whig Club in 1785, but resigned sometime between 1788 and 1792. His disaffection was perhaps due to the abandonment by the Foxite Whigs of their support of Howardian reforms. See IGNATIEFF, *supra* note 12, at 130.

As a Dissenter, Bayley was technically barred by the Test and Corporation Acts from holding a crown office and had to swear false allegiance to the Church of England. *See id.* at 64. A local critic put Bayley's conflict this way:

This man did take the oaths and's qualified,
When he subscrib'd his conscience said he ly'd,
"Conscience begone come I will take the test,
Scruple an oath, a formal thing at best;
Some qualmith men the wrath of Heav'n fear,
But in my C___t what perjur'd rogues I hear:
Besides I find upon mature reflection,
A meer chimera is the resurrection . . ."

ANON., A POLITICAL SATIRE ON THE TIMES 24 (London 1791).

77. THOMAS BUTTERWORTH BAYLEY, COUNTY PALATINE OF LANCASTER: TO THE SPECIAL CONSTABLES OF MANCHESTER AND SALFORD 4 (Manchester, C. Wheeler & Son 1799).

78. A POLITICAL SATIRE ON THE TIMES, *supra* note 76, at 24.

[W]ith becoming activity he investigates the cupboard of every cottager in his neighbourhood,—with a manifest intention to suppress Luxury in its infancy, knowing by Family experience . . . how difficult it is to soar above the loathsome Habitation of a Cellar,—without Temperance and Industry.⁷⁹

Industry was surely a theme of Bayley, and he often found cause to note its absence in others. He condemned the “selfish Indolence” of those crime victims who did not bother to prosecute.⁸⁰ He blamed ministers of state and their “Aversion to any Scheme which requires *continued* Attention, Watchfulness or *Trouble*” for the failure of Howard’s plan for a national penitentiary.⁸¹ Their “*Indolence* is very criminal,” he wrote, “and has all the Effects, in this Case, of the most *premeditated Cruelty*.”⁸² He was especially annoyed by those of his fellow magistrates who “will not act on any Account” and whose dereliction increased Bayley’s own workload.⁸³

Bayley also found reason to criticize some fellow magistrates who worked too much. Although he complained of the burdens of his post⁸⁴ and of its personal expense to him,⁸⁵ he nonetheless held that magistrates should act only in the public interest and should not attempt to profit from their post. He regarded one member of the Salford bench, the Reverend Dr. Maurice Griffith, to be among that breed of magistrates known as “trading justices,” whose extraordinary activity paid richly in fees.⁸⁶ Bayley fought to put Griffith out

79. Thomas Seddon, Sermon at Hardwick (Feb. 15, 1780), *quoted in* Axon, *supra* note 69, at 201 n. 1.

80. See, e.g., MANCHESTER MERCURY, Aug. 9, 1785.

81. Letter from Thomas Butterworth Bayley to the Earl of Clarendon, *supra* note 7.

82. *Id.*

83. Letter from Thomas Butterworth Bayley to Lord Liverpool, *supra* note 70; see also THOMAS BUTTERWORTH BAYLEY, OBSERVATIONS ON THE GENERAL HIGHWAY AND TURNPIKE ACTS 5–6 (London, Joseph Johnson 1772) (observing that output of many magistrates did not keep up with workload).

84. This *Rotation* [of sittings by the magistrates] requires from *each* 50 Attendances in the year To this must be added 12 or 14 days for the Qr Sessions, 4 for other Sessions, 2 for the general Annual County Sessions, In all 70 Attendances. To these must *still* be added *many more* Days, for the Inspection of the Gaol, the Workhouses, the *Madhouses*, the Roads, and the Bridges of the Division, and *also* a Variety of miscellaneous Calls not reducible to any of the above Classes.

Letter from Thomas Butterworth Bayley to Lord Liverpool (Mar. 4, 1790) (258 Liverpool Papers, Duchy of Lancaster Papers 1790–94, B.M. Add. MS 38447, fol. 3). Bayley understandably chafed at frivolous additions to his duties as magistrate: “The requiring two justices to view every tree in the division before it is cut down, may be intended by way of kindness to them, on the supposition that they have ‘*fair round bellies with good capon lined*,’ and therefore need exercise.” BAYLEY, *supra* note 83, at 10.

85. Letter from Thomas Butterworth Bayley to the Earl of Clarendon, *supra* note 7.

86. Griffith seems to have been an unusually busy magistrate throughout the 1780’s. Manchester prison calendars, L.C.R.O., QSB/1, *supra* note 44, at 379–447, record the magistrate responsible for each prisoner’s commitment. A sampling of these shows that Griffith committed between one-fifth and one-half of the prisoners, quite a high number considering that 10 or more magistrates were active throughout the decade. In what appears to have been one of Griffith’s busiest years, 1787, *The Manchester Mercury* reprinted a table of fees to be taken by clerks to the justices that was established in 1754. See MANCHESTER MERCURY, Nov. 20, 1787. The fees ranged from 6d. for a summons to 6s. for the “whole Business [relating] to the Conviction of any Person destroying Game.” *Id.*

In general, clerical magistrates were more active in this era than landed magistrates, who sometimes held the title only for its prestige. See BEATTIE, *supra* note 15, at 63; Hay & Snyder, *supra* note 60, at

of business by establishing regular sittings of magistrates at the New Bayley Courthouse over which he and three of his trusted colleagues would preside in rotation.⁸⁷ But Griffith continued to turn judicial business at a local pub. When Griffith's son, the Reverend John Griffith, was appointed a magistrate in 1791, Bayley's closest ally on the bench resigned in protest. "[A] trading Justice," lamented Justice Samuel Clowes in announcing his resignation, "is one of the worst members of the Community."⁸⁸ The persistence of what one townsman called the "rival court, the '*Crown and Thistle*,' held by the Rev. Magistrates *Griffith and Son*,"⁸⁹ must have deeply embarrassed Bayley. In 1795 he and his colleagues decreed that "ALL Business . . . shall be transacted . . . at the New Bayley Court House, and at no other Place," and "NONE of the Magistrates shall receive, directly or indirectly, for their own Use or Benefit, any of the Fees or Perquisites belonging to their Office."⁹⁰ Although this decree apparently lacked legal force, it seems to have worked. Prison records from 1796 and 1797 show no further commitments by either of the Griffiths.

Given this emerging picture of Bayley as righteous, rigid, and authoritarian, it should be no surprise that he was a stern crime fighter. At the time Clowes resigned in protest of the younger Reverend Griffith's elevation to the bench, Bayley wrote that he would stay on to continue his work on a "Scheme of Police which I have endeavoured to establish for 25 years" and which he later described as something "like a Middlesex police."⁹¹ Despite Bayley's ambitions, London's achievements in police practices eluded Manchester. In 1790 a citizen assembly chaired by Bayley resolved to establish a general fund "for the defraying all the necessary Expences of *advertising, discovering, pursuing, apprehending, and prosecuting*, Felons and Robbers of all Descriptions."⁹² A committee was formed, which Bayley chaired and which resolved to establish an "Office of Police" at Manchester.⁹³ "Officers of Enquiry, and Pursuit" would broadcast descriptions of felons and their deeds to London, Dublin, Glasgow, and elsewhere.⁹⁴ The idea was a national system

16-17; Langbein, *supra* note 66, at 57-58 (discussing trading justices generally).

87. Printed Broadside (Mar. 3, 1790) (258 Liverpool Papers, Duchy of Lancaster Papers 1790-94, B.M. Add. MS 38447, fol. 5); Letter from Thomas Butterworth Bayley to Lord Liverpool, *supra* note 84. Such "rotation offices" were popularized by London magistrates Henry and John Fielding in the 1750's and 1760's, but had been pioneered in London as early as 1737. See BEATTIE, *supra* note 15, at 65-66. On the Fieldings' noteworthy careers as magistrates, see Langbein, *supra* note 66, at 60-76.

88. Letter from Samuel Clowes to Lord Liverpool, *supra* note 59. Clowes added: "[T]he System which has been too generally practiced of setting a Thief to catch a Thief is a ruinous one . . ." *Id.*

89. BATTYE, *supra* note 57, at 69.

90. MANCHESTER MERCURY, Feb. 17, 1795.

91. Letter from Thomas Butterworth Bayley to Lord Liverpool, *supra* note 70.

92. MANCHESTER MERCURY, Apr. 13, 1790. The assembly was the result of an earlier meeting, which Bayley and others had organized to discuss "Measures for common Defence." MANCHESTER MERCURY, Mar. 30, 1790.

93. MANCHESTER MERCURY, May 11, 1790.

94. *See id.*

of criminal intelligence, something that London magistrate Sir John Fielding attempted in the 1770's through publication of the *Hue and Cry*, a national crime journal.⁹⁵ Between 1790 and 1792, Bayley seems to have succeeded in establishing some communication between Manchester and London and Dublin,⁹⁶ but little else was heard of his ambitious scheme of police.

If perhaps unsuccessful in this venture, Bayley succeeded enormously in reforming the one component of the criminal justice system over which he had near-total control—the punishment of crimes at the Salford Quarter Sessions. Before we turn to this reform and to the compassionate purposes Bayley claimed it served, it is worth noting that at least some townspeople saw nothing compassionate about Bayley, his prison, or the sentences he handed down. One said Bayley “is so strenuous a defender of the Laws, that even those [laws] which are generally esteemed lenient,—when dealt out with his spirited exertion,—have . . . unwittingly been called severe.”⁹⁷ Another ascribed this verse to “misanthropic T_m”:

'Tis also clear that life is but a span,
I'll be as big a tyrant as I can,
I'll send poor villains into dungeons black,
And scourge the hungry beggar on the back,
I'll punish all that come within my power,
And serve great Moloch to my latest hour;
Could I but bring poor rascals to their fate,
Whole hecatombs of them I'd immolate.⁹⁸

We should perhaps not make too much of these unflattering images of Bayley. No enforcer of the laws can be liked by all, and Bayley seems to have been widely admired by leading citizens, including the Tory⁹⁹ publisher of *The Manchester Mercury*, which seems never to have printed an unkind word about him or his reforms. Still, it is useful to bear in mind that Bayley was no softy and that despite his self-consciously compassionate rhetoric, we should seek to explain his reforms in a way consistent with his crime-fighting mission.

95. See Hay & Snyder, *supra* note 60, at 19; see also Langbein, *supra* note 66, at 67–72 (reporting on Fielding's early efforts to utilize publicity in fighting crime). Bayley's plan was an ambitious elaboration upon a common practice. Crime victims often placed advertisements in the local newspapers describing a criminal or (more usually) stolen property and offering rewards for capture or return. Tradespeople formed private committees to fund such advertisements. See David Philips, *Good Men To Associate and Bad Men To Conspire: Associations for the Prosecution of Felons in England 1760–1860*, in *POLICING AND PROSECUTION IN BRITAIN*, *supra* note 60, at 113–70; John Styles, *Print and Policing: Crime Advertising in Eighteenth-Century Provincial England*, in *POLICING AND PROSECUTION IN BRITAIN*, *supra* note 60, at 55–65.

96. See *MANCHESTER MERCURY*, Sept. 21, 1790; *MANCHESTER MERCURY*, May 29, 1792.

97. Seddon, *supra* note 79, at 201 n.†.

98. A POLITICAL SATIRE ON THE TIMES, *supra* note 76, at 24–25.

99. John Bohstedt identifies the *Mercury* as a Tory publication. See BOHSTEDT, *supra* note 33, at 109. Its publisher, Joseph Harrop, occasionally wished “Permanency and Prosperity” to the Church and King Club founded by adherents to the Church of England. See, e.g., *MANCHESTER MERCURY*, Mar. 8, 1791.

II. THE TRANSFORMATION OF PUNISHMENT IN MANCHESTER

The following small notice appeared in *The Manchester Mercury* of February 1, 1774:

The Prisoners in the House of Correction humbly beg leave to return their sincere Thanks to Mrs. Bayley, for humanely sending them a Quantity of Bread, Meat, and Coals; which, on Account of the Scarcity of Work, and the Inclemency of the Weather, have afforded them a most seasonable Relief.

That the mother of the town's chief magistrate should have to save the prisoners in the town's prison from starvation was not the only problem with the prison's administration. The same issue of the *Mercury* announced the recapture of one of three men who had escaped a few weeks earlier as well as the loss of a fourth, who left "with his irons on."¹⁰⁰ An engraving of the prison dating from around 1766¹⁰¹ helps to explain these problems. It shows a stone structure the size of a large cottage with a sagging thatched roof. Along the street in front of the prison is a set of stocks, and abutting the prison on one side is an alehouse.¹⁰² It is dusk and apparently cold, and a number of men with cloaks and lanterns are walking toward the alehouse's brightly lighted windows. A small crowd of prisoners watch from behind the bars of one of the prison's two unlighted, unglazed windows. The prisoners are lowering small buckets to the street below, and a woman with outstretched arm has stopped to make a contribution.

Bayley and his colleagues inherited this prison from the days of Elizabeth, when it was used to confine Catholic recusants.¹⁰³ It had served as the house of correction for Salford Hundred since 1657.¹⁰⁴ In the early 1770's, at what may be counted as the threshold of the reform movement, Bayley and his colleagues revamped the prison and its administration. They spent £1671 for such physical improvements as the division of the prison into separate courts for men and women and the addition of workrooms and an infirmary.¹⁰⁵

100. See MANCHESTER MERCURY, Jan. 11, 1774.

101. The engraving is titled "Old Dungeons Built on the Decline on Hunt's Bank." William Harrison attributes it to Barritt and puts the date of execution at 1766. See William Harrison, *The Old House of Correction at Hunt's Bank, Manchester*, 3 TRANSACTIONS LANCASHIRE & CHESHIRE ANTIQUARIAN SOC'Y 89, 95-96 (1885). It is reprinted in Bernard Greenwood, *Manchester's "New Fleet": An Elizabethan Prison for Catholic Recusants*, 67 HARVEST 186, 187 (1954).

102. But a note in the Quarter Sessions Order Books of 1783 says that almshouses adjoin the prison. See L.C.R.O., QSO/2, *supra* note 41, at 152 (Spring & Summer 1783).

103. Harrison, *supra* note 101, at 89-90.

104. See Sylvia S. Tollit, *The First House of Correction for the County of Lancaster*, 105 TRANSACTIONS HIST. SOC'Y LANCASHIRE & CHESHIRE 81 (1953). Despite the title of Tollit's piece, during our period the house of correction served Salford Hundred only and not the county as a whole. It was funded exclusively by Salford Hundred. See Harrison, *supra* note 101, at 94-95.

105. See DELACY, *supra* note 9, at 74-75; C.E. Makepeace, *Manchester's Prisons: A Brief History*, CONTACT: HULL PRISON MAG., Aug. 1970, at 5.

They took such trendsetting administrative measures as banning fee taking from prisoners¹⁰⁶ and closing the "tap," the prison's pub.¹⁰⁷ To compensate the prison governor for the loss of these revenue sources, the bench hiked his salary from £25 to £80 annually.¹⁰⁸ But progress was not uniform. Although the justices stopped up the prison's windows to prevent begging, they made no allowance for the food or clothing of the prisoners, who still had to rely on the charity of family and friends. John Howard noted on one of his inspections of the prison that a collection box stood in front inscribed with the verse, "Sick, and in prison, and ye visited me not."¹⁰⁹

These piecemeal improvements did not keep pace with the reforming spirit of the Salford bench. In 1783, Bayley and Samuel Clowes inspected the house of correction.¹¹⁰ Their unflattering report¹¹¹ repeatedly cited Howard's *State of the Prisons* and enthusiastically embraced Howard's prison regimen of solitary reflection, piety, and labor. Echoing the language in which Howard had condemned many of the nation's prisons, the magistrates found their own prison to be "much crowded, and extremely dirty and offensive."¹¹² They complained that many of the prisoners were kept in irons and noted that this "totally unnecessary" practice was not seen "in *foreign* Prisons."¹¹³ They quoted Howard's pronouncement that "not One who is not *Sick* should be *idle*" and complained that most of their own prisoners were "quite idle and unemployed, [and that] the rest were spinning Candlewick, a very unprofitable Sort of Labour"¹¹⁴—profitable enough, however, for the prison's governor, also a chandler, who was absent when the magistrates stopped by.¹¹⁵ Indeed, only the turnkey's wife was found minding the house. The magistrates lamented that there was no prison chaplain "*nor* any other Regulation, for conducting *any* Sort of religious Worship or Instruction."¹¹⁶ And perhaps worst of all, the indiscriminate mixing of inmates confounded the prison's corrective mission. Instead of exploiting the impressionability of young

106. See DELACY, *supra* note 9, at 78; HOWARD, PRISONS, *supra* note 3, at 435. The abolition of fees far outdistanced a parliamentary act of 1774, which merely outlawed keeping prisoners beyond their terms for nonpayment of fees. 14 Geo. 3, ch. 20 (1774).

107. The magistrates closed the tap in 1777. They indeed banned all alcohol, unless medically prescribed, and thus made the Manchester House of Correction one of the first dry prisons in the country. See DELACY, *supra* note 9, at 106–07. Parliament followed Salford's lead in 1782, closing taps and banning alcohol in houses of correction. 22 Geo. 3, ch. 64, § 8 (1782). In 1784, Parliament closed the taps in county jails as well, see 24 Geo. 3, ch. 54, § 22 (1784), but did not forbid alcohol outright, perhaps on the theory that prisoners who were merely awaiting trial should not suffer such a deprivation.

108. See HOWARD, PRISONS, *supra* note 3, at 435.

109. *Id.* at 435–36.

110. The inspection was required by 22 Geo. 3, ch. 64, § 1 (1782).

111. CLOWES & BAYLEY, *supra* note 5.

112. *Id.* at 1.

113. *Id.* at 3.

114. *Id.* addenda.

115. DELACY, *supra* note 9, at 78 (identifying prison's governor as chandler).

116. CLOWES & BAYLEY, *supra* note 5, at 1.

prisoners, arguably the easiest to reclaim, the prison plan degraded them further:

[The prison lacks] what is essentially necessary, a separate Court to divide the Prisoners committed for *petty* Offences (as *young Persons*, Apprentices, &c.) from the Felons and others of atrocious and abandoned Characters and Conduct. For want of *such Separation*, most Gaols are wretched *Schools* of Wickedness, where many Persons, (especially of tender Years, as yet not hardened or profligate,) are *nominally* sent for Correction for trifling Crimes, but in *fact* are doomed to *Destruction*.¹¹⁷

As an epigram of this manifesto of prison reform in Manchester, Bayley and Clowes declared, "This then should be the *leading* Object of those, who govern Houses of *Correction*, to make the Prisoners better Men."¹¹⁸ The emphasis on the word "correction" was theirs.

Two years later the Salford bench, with Bayley in the chair, pronounced that the house of correction was insufficient "for the Purposes of humane Confinement, wise Correction, and exemplary Punishment." The bench resolved unanimously to construct a new prison able to accommodate 100 inmates in separate cells with facilities provided for prison labor. The new prison would serve to punish "early Transgressions."¹¹⁹ It would be designed by William Blackburn,¹²⁰ who (according to Howard) understood Howard's ideas better than anyone else.¹²¹ Bayley laid the prison's cornerstone on May 22, 1787, above a plaque that paid tribute to Howard, that "most excellent person, who hath so fully proved the wisdom and humanity of separate and solitary confinement of offenders."¹²² The bench voted unanimously (if unavoidably) to name the prison the New Bayley.¹²³

Despite its £13,000 price tag¹²⁴ and revolutionary plan, the new prison apparently won universal acclaim in Manchester,¹²⁵ an astounding fact given

117. *Id.* at 2.

118. *Id.* at 3.

119. MANCHESTER MERCURY, Aug. 9, 1785.

120. MANCHESTER MERCURY, Feb. 22, 1785; L.C.R.O., QSO/2, *supra* note 41, at 154 (Winter 1785).

121. IGNATIEFF, *supra* note 12, at 95.

122. See [JOSEPH ASTON], THE MANCHESTER GUIDE 248 n.* (Manchester, Joseph Aston 1804).

123. See PERCIVAL, *supra* note 69, at 4. The pun was on London's Old Bailey.

124. Quarter Sessions Order Books show cash expenditures of at least £3300. L.C.R.O., QSO/2, *supra* note 41, at 154 (Summer & Fall 1785); L.C.R.O., QSO/2, *supra* note 41, at 155 (Summer & Fall 1786); L.C.R.O., QSO/2, *supra* note 41, at 158 (Winter 1789). Interest payments of at least £600 annually suggest that at least £10,000 was borrowed. See L.C.R.O., QSO/2, *supra* note 41, at 162 (Spring & Summer 1793); L.C.R.O., QSO/2, *supra* note 41, at 163 (Spring 1794). For the prevailing interest rates, see T.S. ASHTON, AN ECONOMIC HISTORY OF ENGLAND: THE EIGHTEENTH CENTURY 27-29 (1955).

125. Percival wrote in his memoir of Bayley that despite earlier opposition to the prison project, "the measure was afterwards so highly approved, even by those justices who were at first strenuous against it," that the bench named the prison in Bayley's honor. PERCIVAL, *supra* note 69, at 4. This passing remark is the only reference I have seen to any opposition to the New Bayley, and it is impossible to know whether any such opposition was based on the prison's cost or its philosophy. Although there is no reason

the quantity of money only recently invested to refurbish the old house of correction, which was now converted to an inn.¹²⁶ Even the Tory publisher of *The Manchester Mercury* demonstrated his familiarity with and approval of the Howardian principles of this new prison, named for one of the town's most prominent Whigs:

The Prison is designed to be so constructed, that, at the same Time the greatest Attention will be bestowed, by Cleanliness and Ventilation, to the Preservation of the Health of the unhappy Criminals, who may be confined in it, the great End of Imprisonment, Reformation of Manners, may be accomplished; the Evils arising from promiscuous Intercourse be avoided, and Opportunities afforded for Reflection and Repentance, by solitary Confinement, and Habits of Industry and Regularity acquired, by proper Employment and steady Discipline.¹²⁷

The political strife that divided the townspeople over many issues¹²⁸ does not appear to have disturbed a shared conviction about the need for this new prison.

Covering nearly three acres and standing three stories tall, the New Bayley boasted an infirmary, a chapel, 130 solitary cells, and many separate workshops.¹²⁹ Neither the building nor its original plans have survived, but there are clues to its design. An 1829 engraving of its facade shows a simple, stately stone structure easily mistaken for the seat of a government ministry. Only the gigantic fetters mounted high above the central arched window disclose the building's gloomy purpose.¹³⁰ Robin Evans has concluded that the Calton Gaol and Bridewell, the plans of which have survived, was copied closely from the New Bayley.¹³¹ The Calton plans called for a cross-shaped structure with four tiers of cells extending out from a circular foyer. A guard

to question Percival's reliability as a source, given the lack of any other evidence of dissent and the bench's unanimity in its decision to build, I think it is unlikely that the prison met any real political or ideological resistance.

126. See Greenwood, *supra* note 101, at 186.

127. MANCHESTER MERCURY, May 29, 1787.

128. In Manchester there were seven political riots in the 1790's alone. Most of these were "Church and King" riots that pitted loyalists of the Church of England against reformers, who were commonly religious dissenters. See BOHSTEDT, *supra* note 33, at 100-01.

129. See [ASTON], *supra* note 122, at 248-53; 1 REMAINS HISTORICAL AND LITERARY CONNECTED WITH THE PALATINE COUNTIES OF LANCASTER AND CHESTER 145 (John Harland ed., Manchester, Chetham Society 1866) [hereinafter REMAINS HISTORICAL AND LITERARY] (reprinting 1794 description) Aston noted in 1804 that there were 53 workshops, but said the "greater part" were erected after 1794. See [ASTON], *supra* note 122, at 252.

130. The engraving is reprinted in S. AUSTIN ET AL., LANCASHIRE ILLUSTRATED 72 (London, Henry Fisher, Son & Peter Jackson 1829) and in EVANS, *supra* note 6, at 149.

131. See EVANS, *supra* note 6, at 146, 150. The Calton plans are hard to reconcile with contemporary descriptions of the New Bayley. For example, the plans suggest the prison had 32 cells on each of three floors, or 96 in all, yet Aston put the number at 130. See *supra* text accompanying note 129.

standing at the center of the foyer could see to the end of each tier¹³² (but could not see *into* each cell as could the keeper of Bentham's Panopticon¹³³). The prison's eight separate courtyards allowed the separation of males from females, of prisoners for trial from those serving time, and of greater offenders from lesser.¹³⁴

There is no existing account of the New Bayley's early administration. The first prisoners were received in April 1790. The first governor, taskmaster, and turnkey were all dismissed in October 1793,¹³⁵ an inauspicious start that no

132. In 1804 Joseph Aston wrote of the New Bayley that "all the four wards . . . may be seen from the centre of each story." [ASTON], *supra* note 122, at 249–50.

133. Bentham wrote *Panopticon* in 1787 and published it in 1791. JEREMY BENTHAM, *Panopticon; or, the Inspection-House* [hereinafter BENTHAM, *Panopticon*], in 4 THE WORKS OF JEREMY BENTHAM 37 (John Bowring ed., 1962). At the time Joseph Aston praised the New Bayley's layout, *see* [ASTON], *supra* note 122, at 247–53, he may well have known of Bentham's radical radial design, which allowed a guard standing in the center of the prison to inspect each of the concentrically arrayed cells. *See* EVANS, *supra* note 6, at 195–235 (examining Panopticon's architectural and penological significance). It is almost certain, however, that William Blackburn's comparatively simple New Bayley Prison, which began construction in 1787, owed nothing to Bentham's scheme.

For all of Bentham's later influence over British and continental penal philosophy, *see* I RADZINOWICZ, *supra* note 17, at 355–96, he played little apparent role in this first era of prison reform. Perhaps that is because his most important works on the nature and role of punishment, *Introduction to the Principles of Morals and Legislation* and *Rationale of Punishment*, although written as early as 1775, were not published until 1811. *See id.* at 381. Perhaps it is because his ideas on punishment were similar to but overshadowed by those of Beccaria. *See id.* at 378–79; *infra* notes 202–05 and accompanying text. One searches in vain for any reference to Bentham in the works of Howard, Hanway, Paul, or any prison builder or commentator of the 1770's and 1780's. Much less did Bentham influence events in Manchester. Bayley never quoted him, and I do not recall seeing his name in the pages of *The Manchester Mercury*.

It is true that in 1778 Bentham published an extensive commentary on an early draft of the Penitentiary Act of 1779. That work applauds "Mr. Howard's book on Prisons" and expresses Bentham's "great . . . pleasure" at the proposed embodiment of Howard's ideas as law. JEREMY BENTHAM, *A View of the Hard-Labour Bill* [hereinafter BENTHAM, *Hard-Labour Bill*], in 4 THE WORKS OF JEREMY BENTHAM, *supra*, at 1, 3. Bentham's purpose in writing, he said, was to "forward[] the good purposes" of the Act, *id.* at 3, and despite nitpicking the details, he largely supported the penitentiary principle. His only noteworthy contribution to the Act's final form was particularly Benthamite: He persuaded Parliament to grant inmates a share of the profits to spur their prison labors. *Id.* at 12–13; *see* 19 Geo. 3, ch. 74, § 45 (1779).

As for *Panopticon*, it appears to have inspired the design of only one of the many prisons built in this era, and that one exception came during the 1790's, just as prison-building fever waned. *See* EVANS, *supra* note 6, at 228, 231. Only two 19th-century British prisons took the Panopticon form. *See id.* at 228. Bentham spent a fortune in time and money promoting the Panopticon. In a showdown before an 1811 parliamentary committee, Bentham and George Onesiphorus Paul put forth competing plans. The Panopticon lost. Paul snubbed the "untried theory of an ingenious and inventive imagination." Moir, *supra* note 71, at 214–15. He also faulted Bentham's neglect of religious instruction, IGNATIEFF, *supra* note 12, at 112, which was the third element of Howard's tripartite regimen for reform, *see supra* notes 3–5 and accompanying text. The committee sided with Paul and resolved on a system of imprisonment that would achieve "reformation and improvement of the mind . . . [through] seclusion, employment, and religious instruction." Moir, *supra* note 71, at 215.

Ignatieff argues that Bentham's materialism put him at the center of an intellectual circle whose ideas about the malleability of human character created an ideological climate receptive to Howard's ideas. *See* IGNATIEFF, *supra* note 12, at 65–79. As I will argue later, *see infra* notes 224–29 and accompanying text, the evidence does not support a claimed connection between materialism and the prison reform of this era.

134. These classifications are set out in the prison's rules. *See* Regulations of the Salford New Bailey [sic], 1794, reprinted in Margaret Eisenstein DeLacy, County Prison Administration in Lancashire, 1690–1850, at 322, 326–27 (1980) (unpublished Ph.D. dissertation, Princeton University).

135. L.C.R.O., QSO/2, *supra* note 41, at 162 (Fall 1793).

doubt prompted the adoption of new rules for the prison's governance in 1794.¹³⁶ Many of the rules, probably written by Bayley,¹³⁷ bore on the behavior of those officials and ensured their presence in the prison, barred them from outside employment, and prevented them from taking fees or any supplement to their salaries. Other rules bore on the universal problems of prison administration, such as security (three men escaped in December 1792¹³⁸) and contraband (particularly alcohol). Cleanliness, diet, and the discipline of rule breakers were regulated in close detail.

The rules also spelled out the philosophy of this new prison. They declared that the goal of imprisonment is to make the inmates "honest Members of Society."¹³⁹ Toward that end, they established a Howardian regimen of solitary reflection, piety, and labor. The solitude was not to be complete; indeed total solitude was prescribed only as a form of punishment. But each prisoner apparently slept alone, and conversation after lockup was banned.¹⁴⁰ To instill piety, the prison's chaplain was to deliver Sunday sermons, read prayers on Wednesdays and Fridays, and appoint someone to read prayers on the other days. He was to visit the prisoners frequently, administering the sacrament and distributing "Books of Moral and Religious Instruction . . . to such Prisoners as may Shew Signs of Repentance and Reformation."¹⁴¹ As for labor, the prison's "Manufacturer" was to "keep all prisoners under his Charge duly employed."¹⁴² The use of the word "manufacturer" in place of the more traditional "taskmaster" may have been meant to indicate that the prisoners were not merely to be kept busy, but to be taught a trade. Most prisoners worked at various aspects of textile production.¹⁴³ Joseph Aston called it "true humanity" that an offender committed for twelve months would, "on his discharge, if he had previously no regular employment, . . . be able to earn his livelihood in a[n] honest manner as a Dimity-weaver."¹⁴⁴

The opening of the New Bayley allowed the acceleration and even the perfection of a scheme of punishment toward which the justices had been moving since the beginning of our period. This changing strategy of punishment emerges with unexpected clarity from the pattern of sentences

136. Regulations of the Salford New Bailey [sic], 1794, *supra* note 134, at 322-27. This is the oldest surviving set of rules for the New Bayley.

137. In 1790 the Salford bench asked Bayley to draw up rules for the new prison. L.C.R.O. QSO/2, *supra* note 41, at 159 (Winter 1790).

138. See MANCHESTER MERCURY, Dec. 4, 1792.

139. Regulations of the Salford New Bailey [sic], 1794, *supra* note 134, at 326.

140. Aston noted in 1804 that "each individual has a cell to himself." [ASTON], *supra* note 122, at 250. It is odd that the rules do not explicitly require single-celling, but the banning of conversation after locking up may indicate that such a rule was presumed.

141. Regulations of the Salford New Bailey [sic], 1794, *supra* note 134, at 323-24.

142. *Id.* at 323.

143. See REMAINS HISTORICAL AND LITERARY, *supra* note 129, at 145. At their discharge the prisoners were entitled to one-sixth of the profit from their labor. See Regulations of the Salford New Bailey [sic], 1794, *supra* note 134, at 322.

144. [ASTON], *supra* note 122, at 251.

imposed by the justices at the Salford Quarter Sessions. I will limit my examination of these sentencing practices to cases of petty larceny, which accounted for between seventy and eighty-three percent of all convictions at the Salford Quarter Sessions during the years studied.¹⁴⁵ (Assault, the second most common crime, accounted for only eight to thirteen percent of all convictions.) As I argued above, the Salford magistrates seem to have taken particular interest in the prosecution of petty larceny. It is safe to presume that they took particular interest in its punishment as well. One indication of this interest is that persons imprisoned for petty larceny were almost always sent to the Manchester House of Correction or, after 1790, to the New Bayley Prison. Persons convicted of assault were often sent instead to the Castle of Lancaster, where the Salford magistrates would have less control over conditions of confinement. I will argue later that the justices' particular interest in the punishment of petty larceny stemmed in part from their concern with young criminals, whose first criminal adventure was often minor theft. Another reason to limit this study of sentencing practices to petty larceny is that petty larceny was the only felony tried at the Salford Quarter Sessions and thus the only crime for which transportation could be imposed. The pattern of sentences imposed in petty larceny cases therefore reveals the bench's changing preferences among the whole range of sentencing options.

Table 6 discloses just how sharply these preferences changed. In 1774-75 the Salford justices imposed transportation in two-thirds of petty larceny cases and imprisonment in one-fifth of such cases. By 1796-97 these figures had more than reversed:

Time Period	1774-75	1781-82	1786-87	1791-92	1796-97
# Convictions of Petty Larceny	40	42	95	129	161
# Transported ¹⁴⁶	27	28	35	37	35
% Transported	67.5	66.7	36.8	28.7	21.7
# Imprisoned	8	14	54	90	126
% Imprisoned	20.0	33.3	56.8	69.8	78.3
# Whipped Only	5	0	6	2	0
% Whipped Only	12.5	0	6.3	1.6	0

TABLE 6. *Sentences in Cases of Petty Larceny at the Salford Quarter Sessions*

145. These and all similar statistics refer to biyearly totals for the years 1774-75, 1781-82, 1786-87, 1791-92, and 1796-97. The source for all such statistics is the Quarter Sessions Order Books, L.C.R.O., QSO/2, *supra* note 41, at 143-66.

146. These figures represent the number of sentences to transportation. Many convicts sentenced to transportation between 1775 and 1787 never actually left England.

As imprisonment became by far the most common form of punishment in cases of petty larceny, the nature of imprisonment also changed. The length of the average term grew sixfold from 1.5 months in 1774–75 to 9.2 months in 1791–92 before falling somewhat to 7.7 months in 1796–97. By the mid-1780's, the bench began to specify that many prison sentences be served at hard labor. In 1792 the bench began to add the condition of solitary confinement.¹⁴⁷ And by 1796–97 virtually every sentence the bench handed down was to be served both at labor and in solitary confinement. The bench had by then dropped the word “hard” from all but a handful of such sentences. One can presume the justices no longer intended labor of the “hardest and most servile kind, in which drudgery is chiefly required, and where the work is little liable to be spoiled by ignorance, neglect, or obstinacy”—the directive of the Penitentiary Act of 1779¹⁴⁸—and instead meant the kind of productive, salable labor that Joseph Aston praised so effusively. As a final elaboration of the nature of imprisonment, the bench virtually abandoned the once-common practice of supplementing prison sentences with whippings:

Time Period	1774–75	1781–82	1786–87	1791–92	1796–97
# Prison Sentences for Petty Larceny	8	14	54	90	126
Average Length of Term (months)	1.5	4.3	7.5	9.2	7.7
# with Labor and/or Solitary Confinement	1	3	15	88	122
% with Labor and/or Solitary Confinement	12.5	21.4	27.8	97.8	96.8
# with Whipping(s)	6	8	36	23	7
% with Whipping(s)	75.0	57.1	66.7	25.6	5.6

TABLE 7. *Prison Sentences in Cases of Petty Larceny at the Salford Quarter Sessions*

These watershed changes in the nature of criminal punishment in Manchester seem in some ways to have been typical of the changes that were occurring nationwide and in other ways to have been extraordinary. The shift

147. We may presume that total solitude was not the intent. *See supra* note 140 and accompanying text.

148. 19 Geo. 3, ch. 74, § 32 (1779).

away from transportation and toward imprisonment has been corroborated by both Michael Ignatieff in his study of sentencing patterns at London's Old Bailey¹⁴⁹ and J.M. Beattie in his mammoth research at the Surrey Quarter Sessions.¹⁵⁰ Beattie also found in Surrey, however, that whippings were relied on as the exclusive punishment in a relatively high proportion of cases until the very end of the century.¹⁵¹ Moreover, Beattie found a far less pronounced increase in the length of sentences, a less enthusiastic embrace of confinement at labor, and a more persistent tendency to supplement prison terms with whippings.¹⁵² One possible explanation for a less complete transformation of sentencing practices in Surrey than in Manchester is that no reformed prison was built in that county until the end of the century.¹⁵³

Although not perfect matches, Beattie's and Ignatieff's findings are enough to show that the sentencing trends observed in Manchester were not random fluctuations, but were real changes that responded to a changing strategy of criminal punishment. That these sentencing trends emerge more clearly in Manchester than in Surrey or at the Old Bailey may reflect the dominant influence of Bayley's reforming vision, a dominance due in part to his personal

149. See IGNATIEFF, *supra* note 12, at 81. At the Old Bailey, imprisonment became more popular over our period, but was never imposed in more than 35% of all cases. *Id.* The use of transportation fell from 74.1% in the early 1760's to as low as 24.1% in the early 1780's, but then rose again to 43.9% in the early 1790's. *Id.* In other ways Ignatieff's findings are less supportive. The use of whippings stood at about the same level in the early 1790's (11.7% of all cases) as in the early 1760's (12.3%). *Id.* And Ignatieff observed a *decrease* in the average length of prison terms. *Id.* at 82. It is difficult, however, to draw direct comparisons with Ignatieff's figures, as they consider all cases adjudicated at the Old Bailey and not merely petty larcenies. See *id.* at 81-82.

150. See BEATTIE, *supra* note 15, at 597. The Surrey justices imposed transportation in 57.8% of larceny cases between 1763 and 1775 (percentage figured by author); in 6.4% of such cases between 1776 and 1782; and in between 21.4 and 29.7% of such cases through the turn of the century. See *id.* at 561, 578, 597. They resorted to imprisonment in 15.3% of larceny cases between 1763 and 1775; in 39.1% of larceny cases between 1776 and 1782; and in as many as 75.1% of such cases by the turn of the century (percentages figured by author). *Id.*

It is important to note that Beattie's figures do not provide a perfect comparison to my findings in Manchester, as his figures consider penalties for both petty larceny and grand larceny (and indeed for all property offenses), whereas mine are for petty larceny only. I do not believe this difference is significant. At both the Surrey and the Salford Quarter Sessions the magistrates interpreted their jurisdiction to include both crimes. The difference is that in Manchester the justices favored the fiction of calling all larcenies petty larcenies even if the value of goods stolen exceeded a shilling. See *supra* notes 57-60 and accompanying text. In Surrey the justices abandoned this fiction and began openly handling grand larceny cases in 1752. See BEATTIE, *supra* note 15, at 286. The proportion of property offenses tried in the Surrey Quarter Sessions that were not either petty or grand larcenies cannot have been great.

151. Whipping was the exclusive punishment in 26.1% of larceny cases at the Surrey Quarter Sessions between 1763 and 1775 (percentage figured by author); in 35.5% of such cases between 1776 and 1782; in 38.3% between 1783 and 1787; and in 23.1% between 1788 and 1798. See BEATTIE, *supra* note 15, at 561, 578, 597. Only after 1798 did the use of whippings as an exclusive punishment drop off sharply. *Id.* at 597.

152. The average length of prison terms ordered in larceny cases at the Surrey Quarter Sessions rose from between two and three months between 1766 and 1775 to between three and four months between 1776 and 1782. *Id.* at 562, 580. The average then fell to 2.5 months between 1783 and 1794 and increased again to 4.6 months between 1800 and 1802. Even at the end of the century only about 64% of such prison terms were ordered to be served at labor, while 18% were to be accompanied by whippings (percentages figured by author). *Id.* at 607-08.

153. See *id.* at 605.

power in Manchester and in part to Manchester's distance from the assizes. The clarity of these sentencing trends may also reflect Manchester's place at the very heart of Britain's industrial revolution. In any event, the changes that took place are clear: Bayley and his colleagues on the Salford bench relied more and more on imprisonment as a mode of punishment and less and less on transportation and whippings. To accommodate this preference, they built a new prison where they instituted a regimen of solitary reflection, piety, and labor. To punctuate their reliance on this mode of punishment, they greatly lengthened the average prison term and almost completely abandoned whippings as a supplement to imprisonment. Our next step is to consider their purpose in making these changes.

III. THE NEW STRATEGY OF PUNISHMENT

Before setting out in search of the reformers' new penal "strategy," we need to rule out the possibility that the reform had no strategy, but was merely an instrumental response to historical accidents. This is no trivial bit of housecleaning, for the argument has been well made that a search for the historical source of this wave of prison building will lead us to two events: the start of war with the American colonies in 1775, which brought the transportation of convicts to an abrupt if temporary halt, and an epidemic of "jail fever" that swept the country in 1783. That the twin outbreaks of war and fever help to explain the nearly wholesale, nationwide embrace of Howard's reform proposals in the last quarter of the century is beyond serious dispute. If these events are *enough* to explain the timing and shape of the reform, then we can bring this study to a quick close. I will argue in this Part that war and fever help greatly to explain the timing but do very little to explain the shape of reform. We cannot account for the plan and regimen of the new prisons without seeing them as instruments of a new, corrective strategy of punishment. Showing that this shift in strategy grew out of mounting concern with crime by youths will be the burden of Parts V and VI.

A. *The Impact of War and Fever*

There can be no question that the American War impelled *some* form of change in penal practices. For most of the century, authorities had the luxury of cheaply dispatching many of the nation's more serious criminals to seven- or fourteen-year terms of transportation in America. When the rebellious Americans sent word in 1775 that Britain's criminal masses were no longer welcome, authorities scrambled to find an alternative. The "temporary" solution settled upon in 1776 was to house transportees on converted ships anchored

in the Thames.¹⁵⁴ But these "hulks" soon grew overcrowded,¹⁵⁵ and on-board mortality was scandalous. Bayley complained in 1786 that eight convicts sent to the hulks from Lancashire during the previous year already had died.¹⁵⁶ Nonetheless, courts continued to impose sentences of transportation. With no place to go, transportees swelled the nation's jails. By 1785 at least 1500 prisoners throughout England awaited transportation.¹⁵⁷

The consequent overcrowding created ideal conditions for an epidemic. Jail fever, a form of typhus transmitted by lice, raged on and off throughout the century. In a few celebrated cases, the fever vaulted prison walls into courtrooms and communities.¹⁵⁸ New sanitary measures enacted in 1774¹⁵⁹ perhaps brought about something of a respite, for in 1782 Howard found no fever in his survey of the nation's prisons.¹⁶⁰ Then, in 1783, fever reared up again throughout the country.¹⁶¹

The settlement of Botany Bay in Australia in 1787 restored transportation as a viable (though now far more expensive) option and ended the immediate crisis.¹⁶² By then, of course, prison building was raging. The timing of construction owes much to the crises of war. Douglas Hay has argued that the "interruption of transportation by the American War, the inadequacies of the hulks, and the greater expense of transportation to Australia after 1787 were probably the important reasons for the increasing use of imprisonment."¹⁶³ Although war served to catalyze change, change was already under way. Resort to transportation had begun to fall off before the American War cut it off, "for the judges had already seen *strong objections* to transportation."¹⁶⁴

154. See 16 Geo. 3, ch. 43 (1776) (sentencing males to labor "in raising sand, soil and gravel from and cleaning the river Thames" in place of transportation); BEATTIE, *supra* note 15, at 565-69. Originally intended as a "temporary expedient," the hulks survived until 1858. See *Report of the Committee of the House of Commons Relative to the Transportation of Felons* 3 (June 21, 1785), P.R.O., H.O. 42/6 [hereinafter *Report on Transportation*]; J.J. TOBIAS, NINETEENTH-CENTURY CRIME: PREVENTION AND PUNISHMENT 133 (1972).

155. See Letter from Thomas Butterworth Bayley to Lord Sydney (Jan. 26, 1785), P.R.O., H.O. 42/6 (complaining of overcrowding on hulks).

156. See Letter from Thomas Butterworth Bayley to Lord Sydney (Jan. 22, 1786), P.R.O., H.O. 42/8.

157. See *Report on Transportation*, *supra* note 154, at 14. That same year Bayley testified before a Commons committee that in some cases persons who would otherwise have been transported were imprisoned instead because of the troubles with transportation. See *First Report from the Committee Appointed To Enquire What Proceedings Have Been Had in the Execution of an Act . . . 4* (May 9, 1785), P.R.O., H.O. 42/6. Howard reported an increase of 84% in the nation's prison population between 1776 and 1787-88. See EVANS, *supra* note 6, at 131.

158. See IGNATIEFF, *supra* note 12, at 44-45. For an excellent description of the disease and contemporary theories of its causation, see EVANS, *supra* note 6, at 94-117.

159. See 14 Geo. 3, ch. 59 (1774).

160. HOWARD, PRISONS, *supra* note 3, at 468.

161. See *id.*; IGNATIEFF, *supra* note 12, at 84.

162. See BEATTIE, *supra* note 15, at 599-601.

163. Douglas Hay, *Crime, Authority and the Criminal Law: Staffordshire, 1750-1800*, at 487-88 (1975) (unpublished Ph.D. dissertation, University of Warwick).

164. HOWARD, LAZARETTOS, *supra* note 3, at 220 n.* (quoting from appendix of draft of Penitentiary Act of 1779). J.M. Beattie found in his study of Surrey that resort to transportation fell off sharply before war broke out in 1775—supporting the conclusion that the abandonment of transportation was a product of policy, not necessity. See BEATTIE, *supra* note 15, at 546; see also DELACY, *supra* note 9, at 112

Jonas Hanway, a leading proponent of reform, began his crusade for the solitary confinement of prisoners in 1772;¹⁶⁵ the outbreak of war, he said, merely gave "stronger reasons for *new expedients*."¹⁶⁶ Howard started touring the nation's prisons in 1773. In 1774 he testified before a Commons committee,¹⁶⁷ and that year Parliament acted to restrict fee taking and to compel minimal sanitation measures in prisons.¹⁶⁸ And well before the outbreak of war, the Salford bench had completed substantial renovations of the Manchester House of Correction.

Similarly, the jail fever outbreak of 1783 helps to explain the increased pace of prison building in the 1780's, but leaves other questions unanswered. In her study of prison reform in Lancashire, Margaret DeLacy calls the outbreak the "immediate precipitant" of the era's passion for prison building.¹⁶⁹ She argues that reformers like Bayley succeeded in their campaign for new prisons only by exploiting their communities' fear of fever.¹⁷⁰ Bayley indeed seems to have played on fear. In January 1784 he and his colleagues warned the Home Office of a "pestilential fever" at Lancaster Castle.¹⁷¹ That same year the Salford magistrates noted that the county's prisons were "crowded with very great Numbers of unhappy Wretches, many of whom *are* dangerously Sick of a putrid Fever, of which the late Gaoler at *Lancaster* and several Prisoners have lately died."¹⁷² The justices joined in a resolution to advise the citizens of Lancashire that their prisons ought to be constructed so as to prevent "the dreadful public Calamities" that would follow if the fever were not contained.¹⁷³

(downplaying importance of interruption of transportation).

165. See JONAS HANWAY, *OBSERVATIONS ON THE CAUSES OF THE DISSOLUTENESS WHICH REIGNS AMONG THE LOWER CLASSES* 50 (London, J. & F. Rivington 1772).

166. See JONAS HANWAY, *SOLITUDE IN IMPRISONMENT* 92 (London, 1776). Bentham said we should take "some consolation" if the misfortune of war should have speeded "one of the most signal improvements that have ever yet been made in our criminal legislation." BENTHAM, *Hard Labour Bill*, *supra* note 133, at 5; see also EVANS, *supra* note 6, at 132 ("The fundamental issue was still the reform of the prison system, but it was the immediate necessity for expansion that prompted new building"). Joanna Innes, *Prisons for the Poor: English Bridewells 1555-1800*, in *LABOUR, LAW, AND CRIME: AN HISTORICAL PERSPECTIVE* 42, 98 (Francis Snyder & Douglas Hay eds., 1987) ("The outbreak of war forced the pace of change."). Joanna Innes notes that dissatisfaction with transportation prompted increased interest in imprisonment beginning in the 1760's. See *id.*

167. See IGNATIEFF, *supra* note 12, at 52.

168. See 14 Geo. 3, ch. 20 (1774); 14 Geo. 3, ch. 59 (1774).

169. See DELACY, *supra* note 9, at 81. It is important to note that Bayley and Clowes' report on the conditions of the Manchester House of Correction, *supra* note 5, was written in May 1783—some months before the outbreak of fever.

170. See DELACY, *supra* note 9, at 81, 93-94.

171. Letter to the Home Office (Jan. 26, 1784), P.R.O., H.O. 42/4, quoted in IGNATIEFF, *supra* note 12, at 85.

172. *Manchester Court of Quarter Sessions, Christmas 1784*, MANCHESTER MERCURY, Feb. 3, 1784.

173. See L.C.R.O., QSO/2, *supra* note 41, at 153 (Winter 1784); *Manchester Court of Quarter Sessions, Christmas 1784*, *supra* note 172. Samuel Denne, an early proponent of solitary confinement, argued that separate celling would guard against the spread of fever. See [DENNE], *supra* note 23, at 6-15. He then made the point a metaphor for the moral purposes of solitary confinement:

[T]here is a yet more pernicious, because a more extensive and lasting disorder, contracted or increased in our public gaols; and for the cure of which no medicine sufficiently powerful has

While taking advantage of such fears, however, Bayley disdained them. He complained of those judges and magistrates who had "no *other* object in View than to prevent the Contagion of the *Gaol* Fever."¹⁷⁴ Though their "Fear, and the Selfish Ideas of personal safety carry them so far," Bayley wrote, the "other great Points of Policy & Humanity in the plan of the Penitentiary House—Solitary Imprisonment etc,—have been treated as chimerical & expensive *Experiments*."¹⁷⁵ This complaint points up the limits of the argument that the reform was an instrumental response to the historical accidents of war and fever. Almost every "chimerical & expensive" experiment Bayley proposed was in fact adopted at the New Bayley and at the nation's other reformed prisons. True, no *national* penitentiary was built in this era, but that was due not to the plan's expense or novelty, as Bayley charged, but to administrative hassles and constitutional obstacles.¹⁷⁶ The great number of new local prisons reflected a wholesale embrace of the Howardian regimen of solitary reflection, piety, and labor. The prisons were not merely cleaner and better ventilated—improvements that would have satisfied sanitary concerns—but had workrooms and chapels, workmasters and chaplains, separate courts to segregate the various classes of prisoners, and separate cells to prompt reflection on past wrongs. Nor can war or fever explain the increasing length of prison terms or the near-abandonment of whippings as a supplement to imprisonment.

Finally, neither war nor fever can explain why the Salford bench continued to rely less and less on transportation as a mode of punishment even after the settlement of Botany Bay in 1787 restored transportation as a viable option. Bayley explained his dislike of transportation without reference to the practical difficulties surrounding it:

I am convinced from my Experience & so are all my Brethren, that solitary Imprisonment . . . would be the most effectual mode of Punishment, both to *prevent* Offences, & to *reform* Criminals. Our present System of Transportation, Confinement to the Hulks etc. I fear is totally inadequate to *these* Purposes.¹⁷⁷

Bayley's objection to transportation was its incapacity to "*reform* Criminals." I suggest it would not be ingenuous to accept at face value this statement of

been administ[er]ed: namely, the complete corruption of the morals of almost all the persons who are sent into them. . . . [T]hey are inoculated with wickedness . . .

Id. at 15–16.

174. Letter from Thomas Butterworth Bayley to the Earl of Clarendon, *supra* note 7.

175. *Id.* The "plan" to which Bayley referred was the Penitentiary Act, 1779, 19 Geo. 3, ch. 74. Howard warned that unless moral reforms keep pace with hygienic reforms, "a suspicion will arise, that what has been already done has proceeded, chiefly, from the selfish motive of avoiding the danger to our own health, in attending courts of judicature." HOWARD, LAZARETTOS, *supra* note 3, at 233.

176. See IGNATIEFF, *supra* note 12, at 94–95.

177. Letter from Thomas Butterworth Bayley to Lord Sydney, *supra* note 155.

the reformers' motivation and to seek to explain the reform as the adoption of a *corrective* penal strategy.

B. *The Strategy of Correction*

To do otherwise would require us to reject as pretextual an enormous body of rhetoric in which the reformers self-consciously espoused correction as the one true penal strategy. I have already quoted Bayley and Clowes' declaration in their 1783 report that the "*leading Object*" of houses of correction was "to make the Prisoners better Men."¹⁷⁸ They were loosely paraphrasing Howard, who declared in *State of the Prisons* that "[t]o reform prisoners or to make them better as to their morals, should always be the *leading* view in any house of correction."¹⁷⁹ In July 1785, when Bayley announced to the grand jury of the Salford Quarter Sessions the unanimous decision of the magistrates to build a new prison, he again borrowed from his better-known contemporaries to establish the prison's corrective mission.¹⁸⁰ From Paul he quoted the epigram, "Confinement to *punish*, ought also to be a Confinement to *reform*."¹⁸¹ From the Penitentiary Act of 1779,¹⁸² written by Howard, Blackstone, and Eden, he quoted this statement of the tripartite regimen of the new prisons: "[S]olitary Imprisonment, well regulated Labour, and religious Instruction, may be Means, under Providence, of deterring others from the Commission of Crimes, of reforming Individuals, and inuring them to Habits of Industry."¹⁸³ Surely the new prisons would help to solve the overcrowding brought on by war, and surely they would help to stop the spread of fever, but the reformers saw in them far greater potential—the chance to reform the criminal mind. Howard recounted an inscription above a prison door: "[I]f even wild beasts can be tamed to the yoke, we should not despair of reclaiming irregular men."¹⁸⁴

The reformers apparently believed that solitary reflection, religious counseling, and well-supervised labor would make prisons places where

178. CLOWES & BAYLEY, *supra* note 5, at 3.

179. HOWARD, PRISONS, *supra* note 3, at 40.

180. See T.B. Bayley, *Extracts from a Charge Delivered to the Grand Jury at the Quarter Sessions at Manchester, July 21st, 1785*, MANCHESTER MERCURY, Aug. 9, 1785.

181. See PAUL, *supra* note 7, at 10 ("Confinement to Punish should also be Confinement to reform . . .").

182. 19 Geo. 3, ch. 74, § 4.

183. MANCHESTER MERCURY, *supra* note 80 (quoting Penitentiary Act). Two years later Bayley praised innovations in Oxfordshire, noting the "evident" "tendency to reformation" "of the mode of punishing felons by solitary imprisonment and hard labour." T.B. Bayley, Letter, MANCHESTER MERCURY, Mar. 27, 1787.

184. HOWARD, PRISONS, *supra* note 3, at 136. Howard often made the point that punishment's aim should be correction, sometimes in language that carried a more sinister tone: "We have too much adopted the gothic mode of correction, viz. by *rigorous severity*, which often *hardens* the heart; while many foreigners pursue the more *rational* plan for *softening* the mind in order to its amendment." HOWARD, LAZARETTOS, *supra* note 3, at 226.

irregular people could be reclaimed. If so, then longer prison terms would be more corrective, and the system as a whole would be more corrective the more heavily it relied on imprisonment to the exclusion of other forms of punishment. Whether right or wrong, the reformers were certainly not irrational in this belief. The new prisons bore at least a superficial resemblance to schools and hospitals and other institutions charged with the function of making people better. Those other forms of punishment that were relied on less and less during the reform—executions, whippings, and transportation—could claim no similar potential to correct the offender.

Indeed, it seems clear that correction was not a primary goal of criminal justice before the reform. The penal strategy of the Bloody Code was deterrence through fear, a point one judge made with flair when he advised a convict, "You are not to be hanged, Sir, . . . for stealing a horse, but you are to be hanged that horses may not be stolen."¹⁸⁵ As only a small percentage of felons actually went to the gallows, and as most of those who were not hanged were, at worst, branded and transported, the Code seemed to stake the entire deterrent power of the criminal justice system on the exemplary impact of the occasional hanging. Transportation, the primary penal weapon of the quarter sessions before the reform, could not claim much deterrent effect. Banishment to Maryland or Virginia (the likely destinations before 1775) had little power to terrify.¹⁸⁶ Transportation merely "depriv[ed] the party injuring of the power to do future mischief"¹⁸⁷—what we today call incapacitation.

The trend away from strategies of deterrence and incapacitation and toward a strategy of correction was neither altogether sudden nor altogether smooth. Bridewell, the nation's first house of correction, opened in London in 1557. During the next seventy years generic "bridewells" spread throughout England. Their builders intended them to teach habits of industry to the idle poor, but from the beginning, bridewells took in a handful of petty criminals. They may

185. HENRY FIELDING, *A JOURNAL OF A VOYAGE TO LISBON* 21 (London, J. Wenman 1785). The anonymous author of the 1701 tract with the eye-catching title, *Hanging Not Punishment Enough*, put it this way: "Sanguinary Laws are not chiefly intended to punish the present Criminal, but to hinder others from being so; and on that account Punishments in the Learned Languages are called *Examples*, as being design'd to be such to all mankind." ANON., *HANGING NOT PUNISHMENT ENOUGH FOR MURDERERS, HIGH-WAY MEN, AND HOUSE-BREAKERS* (1701), quoted in BEATTIE, *supra* note 15, at 488; see also THOMAS LEDIARD, *A CHARGE DELIVERED TO THE GRAND JURY AT WESTMINSTER* 6 (London 1754), quoted in Randall McGowan, *The Body and Punishment in Eighteenth-Century England*, 59 J. MOD. HIST. 651, 664 (1987) (declaring that task of justice is "to punish the guilty in the most exemplary manner, for penalty and for example").

186. At least the experts thought so. See WILLIAM EDEN, LORD AUCKLAND, *PRINCIPLES OF PENAL LAW* 33 (London, B. White, 2d ed. 1771) ("[The transported convict] is merely transferred to a new country; distant indeed, but as fertile, as happy, as civilized, and in general as healthy, as that which he hath offended."); ABBOT E. SMITH, *COLONISTS IN BONDAGE: WHITE SERVITUDE AND CONVICT LABOR IN AMERICA, 1607-1776*, at 118-19 (1947) (identifying Maryland and Virginia as most common destinations). But see A. ROGER EKIRCH, *BOUND FOR AMERICA: THE TRANSPORTATION OF BRITISH CONVICTS TO THE COLONIES* 62-69 (1987) (detailing desperate efforts by some convicts to escape transportation).

187. 4 WILLIAM BLACKSTONE, *COMMENTARIES* *11 (identifying purposes of punishment in general).

be deemed Britain's first experiment in corrective incarceration.¹⁸⁸ Parliament dramatically extended the experiment in 1706 with an act that authorized sentences at hard labor for convicts who had been spared from execution. A bare dozen years later Parliament ended the experiment with an act that made transportation Britain's primary noncapital penal technique. For the next half-century imprisonment rarely served to punish crime.¹⁸⁹

Just as imprisonment in the incarnation of the old bridewells—in which prisoners lodged indifferently in one or two rooms—was falling out of favor in the early part of the eighteenth century, several farsighted reformers proposed models for the solitary confinement of inmates.¹⁹⁰ These models, as elaborated by Howard, Hanway, Paul, Bayley, and others, took hold in the last quarter of the century. Yet even after the reforming tide turned decisively in favor of corrective punishment, there was one major, if brief, resurgence of deterrent tactics. At the outset of the 1780's, as war with America came to a close, soldiers returned home to Britain by the tens of thousands.¹⁹¹ Many

188. The most complete account of the early bridewells is by Joanna Innes. See Innes, *supra* note 166, see also BEATTIE, *supra* note 15, at 492–93; ADAM J. HIRSCH, *THE RISE OF THE PENITENTIARY PRISONS AND PUNISHMENT IN EARLY AMERICA 13–18* (1992); JOHN H. LANGBEIN, *TORTURE AND THE LAW OF PROOF 33–38* (1977). There is evidence that the early bridewells, like the first modern prisons, made the reformation of young persons a priority. See HIRSCH, *supra*, at 14; LANGBEIN, *supra*, at 35.

Several studies have noted the influence of the Dutch houses of correction founded in the late 16th and early 17th centuries. Although the Rasphuis (so called because inmates rasped wood for use in dyeing) emerged slightly later than the English bridewell, its great success caught the attention of Britain's late 18th-century reformers. See BEATTIE, *supra* note 15, at 550–51 & n.53; HIRSCH, *supra*, at 17; IGNATIEFF, *supra* note 12, at 52–53; LANGBEIN, *supra*, at 35–38; Innes, *supra* note 166, at 81–82. See generally THORSTEN SELLIN, *PIONEERING IN PENOLOGY: THE AMSTERDAM HOUSES OF CORRECTION IN THE SIXTEENTH AND SEVENTEENTH CENTURIES* (1944) (laying out history and administration of Rasphuis); PIETER SPIERENBURG, *THE PRISON EXPERIENCE 41–55* (1991) (same). Howard greatly admired the "Rasp-houses." He wrote of the "ardent wish" they inspired in him "that our prisons also, instead of echoing with profaneness and blasphemy, might hereafter resound with the offices of religious worship; and prove, like these, the happy means of awakening many to a sense of their duty to God and man." HOWARD, *PRISONS*, *supra* note 3, at 50. Howard noted that the Penitentiary Act of 1779 "was originally founded on the principal regulations of the Dutch rasp-houses and spin-houses." HOWARD, *LAZARETTOS*, *supra* note 3, at 229 n.*; see also [DENNE], *supra* note 23, at 32 n.1, 76 (drawing inspiration from Dutch model). Thorsten Sellin has noted that the founders of the Rasphuis intended the institution to provide a gentle chastisement appropriate to young offenders. See SELLIN, *supra*, at 18–19, 25–26, 41–43; accord SPIERENBURG, *supra*, at 42, 45–46.

189. See 5 Anne, ch. 6 (1706); 4 Geo. 1, ch. 11 (1717); BEATTIE, *supra* note 15, at 500–06; Innes, *supra* note 166, at 90, 98. Why the bridewells fell into greater disuse is by no means clear. Joanna Innes summarizes one point of view (not hers): The decline of the bridewells was "symptomatic of a general decay of governmental ambition and enfeeblement of administrative capacity traditionally supposed to have characterized English domestic government in the century and more following the Civil War." Innes, *supra* note 166, at 44. Innes herself insists that the bridewells had a "persistent appeal," *id.*, but identifies these factors in their fall from favor: the Transportation Act of 1718, which permitted courts to ship minor felons to America, see *id.* at 98; a parliamentary act of 1720 that filled bridewells with persons awaiting trial and may have crowded out convicted criminals, see *id.* at 94–95; a possible switch in emphasis from bridewells to workhouses in the 1720's and 1730's, see *id.* at 93; a parliamentary act that prompted a "rash of [bridewell] closures" between 1740 and 1742, *id.* at 92, 94; and a decline in enthusiasm for the reformation of manners, see *id.* at 95.

190. See IGNATIEFF, *supra* note 12, at 53–54; see also BEATTIE, *supra* note 15, at 548–58 (cataloguing 18th-century proposals for imprisonment).

191. In 1783 about 130,000 men were discharged home. See Douglas Hay, *War, Dearth and Theft in the Eighteenth Century: The Record of the English Courts*, 95 PAST & PRESENT 117, 139 (1982).

had been convicts, impressed into service in lieu of other punishment,¹⁹² and long years in the trenches had not likely improved their dispositions. In any event the authorities perceived a crime wave and acted with force to end it.¹⁹³ There followed a rash of executions in London, its neighboring counties, Staffordshire, Essex, and probably the whole country.¹⁹⁴ The plague did not pass over Lancaster:

Time Period	1774-75	1781-82	1786-87	1791-92	1796-97
# of Capital Sentences	6	8	21	15	9
# of Executions	0	1	9	8	3

TABLE 8. *Capital Sentences and Executions at the Lancaster Assizes*

As masses of soldiers returned to Manchester,¹⁹⁵ the Salford magistrates embarked on their own campaign of penal terror. It took the form of a stunning increase in public whippings:

Time Period	1774-75	1781-82	1786-87	1791-92	1796-97
Total # of Whippings	16	13	58	28	10
# Public Whippings	6	5	53	21	0
# Private Whippings	10	2	4	7	10
# Unspecified	0	6	1	0	0

TABLE 9. *Whippings Ordered at the Salford Quarter Sessions*

The justices usually specified that the offender be whipped "until Blood comes." It was an old-fashioned, pre-reform resort to deterrent penology.

192. For example, James Stott was permitted to enlist rather than serve a sentence after his conviction at a 1780 sitting of the Salford Quarter Sessions. He later deserted. See L.C.R.O., QSO/2, *supra* note 41, at 151 (Fall 1782).

193. For arguments that peace brought crime, see BEATTIE, *supra* note 15, at 225-29, 583-84, 587; IGNATIEFF, *supra* note 12, at 82; Hay, *supra* note 191, at 138-45. But see Innes & Styles, *supra* note 12, at 391-95 (questioning the standard view).

194. See BEATTIE, *supra* note 15, at 532-33, 583-85, 587 & n.124, 588 & n.126; IGNATIEFF, *supra* note 12, at 86-87; 1 RADZINOWICZ, *supra* note 17, at 147; Hay, *supra* note 191, at 520-24; King, *supra* note 67, at 185 n.51. Contemporaries were aware of the phenomenon. In 1785 a committee of the House of Commons referred to "the late increase in the Number of Public Executions." *Report on Transportation*, *supra* note 154, at 4.

195. Thomas Percival referred to a peacetime influx when calculating the town's population in December 1783. See PERCIVAL, *supra* note 29, app. at 63.

But this peacetime crisis did not derail the reform. The trend toward imprisonment and away from transportation continued uninterrupted; there was simply a brief surge in the number of executions and in the number (if not the percentage) of prison sentences that were supplemented by whippings. When the crisis ended with the resumption of war in 1793, so did the bench's rather desperate resort to terror. By 1796–97, only a tiny percentage of convicts were whipped, and all of those in private. Manchester's new penal strategy was apparently in place.

That this new strategy was a corrective one is a conclusion supported first of all by a commonsense look at its techniques. Imprisonment at hard labor and in solitary confinement was not an obvious instrument of terror. Despite the boasts of some prison builders that their prisons were half empty because potential criminals were terrified to go there,¹⁹⁶ the very walls that defined the concept of prisons, intimidating as they might be, lacked the impact of a body thrashing at the end of a rope. Nor were the new prisons particularly effective in incapacitating criminals. Of course, a convict locked behind the high stone walls of the New Bayley could not much harm society, but in an average of seven to nine months, that convict would again be afoot. Justices bent upon incapacitating criminals would never have foregone the option of sending them for seven years to Botany Bay. Nor would they have elaborated the prison regimen by the combination of solitary reflection, piety, and labor that distinguished prisons built in this reform era. Moreover, as I have noted, the rhetoric of Bayley and other reformers makes it very plain that they regarded their new prisons as corrective instruments.

But if the reformers adopted a corrective penal strategy, why did they not abandon executions, transportation, and whippings? One answer, of course, is that opinion was not unanimous on the efficacy of the new prisons and the new corrective penology. A more important answer is that *not every* criminal was perceived to be susceptible to reform. Most of the rest of this Article will examine the reformers' views about *which* criminals were most readily reformed. Before proceeding to that rather complicated question, let me present one simple—but startling—sentencing policy that emerges from the records of the Salford Quarter Sessions and that suggests one manner in which the justices identified those convicts most susceptible to reform.

From the beginning of our period the Quarter Sessions Order Books, which recorded the sentences imposed at the quarter sessions, noted a small number of petty larceny cases in which the accused pleaded guilty. Taking guilty pleas was perhaps not a widespread practice in this era,¹⁹⁷ yet by the

196. See EVANS, *supra* note 6, at 141–42.

197. In his study of the courts in Surrey, J.M. Beattie found that only about four percent of all those charged with petty larceny between 1722 and 1802 pleaded guilty. BEATTIE, *supra* note 15, at 336. Beattie concluded roundly, "There was no plea bargaining in felony cases in the eighteenth century." *Id.* at 336–37, see also Malcolm M. Feeley & Charles Lester, *Legal Complexity and the Transformation of the Criminal*

end of our period guilty pleas had become quite common in petty larceny cases in Manchester:

Time Period	1774-75	1781-82	1786-87	1791-92	1796-97
# Persons ¹⁹⁸	42	48	109	143	174
# Convicts Who Pled Guilty	3	8	25	31	80
% Same	7.1	16.7	22.9	21.7	46.0

TABLE 10. *Guilty Pleas in Cases of Petty Larceny*

During these five biannual periods, nearly half (170 of 369) of all those persons convicted of petty larceny *after trial* were sentenced to transportation. *Not one* of 147 persons who pleaded guilty was sentenced to transportation—and all but five were sentenced to prison. It is difficult to escape the conclusion that the Salford justices were engaging in plea bargaining with defendants before the bar. The bargain provided that the defendant would not contest the charge, and the justices would imprison rather than transport the defendant.¹⁹⁹ If this was indeed the practice, we may draw two conclusions. First, when given the choice, defendants would rather be imprisoned than transported—suggesting that imprisonment had even less force than transportation as a terrorizing deterrent. Second, the justices regarded those who pleaded guilty as somehow more suitable for imprisonment than those who insisted upon a trial. Although I have found no contemporary commentary on the issue (suggesting that the practice of plea bargaining in Manchester was clandestine), we might conclude that Bayley and his colleagues, like some judges and penal theorists today, regarded the proffer of a guilty plea as acceptance of responsibility for one's crime and thus as a first step toward reformation.²⁰⁰

Process, in *SUBJEKTIVIERUNG DES JUSTIZIELLEN BEWEISVERFAHRENS* 337, 337, 345-46 (André Gouron et al. eds., 1994) (reporting very small number of guilty pleas at London's Old Bailey in 18th century); Albert W. Alschuler, *Plea Bargaining and Its History*, 79 COLUM. L. REV. 1, 8-10 (1979) (arguing that plea bargaining was quite rare in both Britain and America until well into 19th century).

198. Note that this table reports the number of petty larceny *convicts*, not the number of petty larceny *cases*, as in earlier tables. Because some cases involved codefendants, the number of convicts is larger than the number of cases.

199. It is possible, but by no means clear, that the bargaining also extended to the *length* of the prison term. During the five biannual sample periods there were three petty larceny cases with multiple codefendants in which only one codefendant pleaded guilty. In one of these all three codefendants received the same sentence. In each of the other two cases, however, the codefendant convicted after trial received a prison sentence exactly twice as long as that of the codefendant who pleaded guilty. L.C.R.O., QSO/2, *supra* note 41, at 151 (Summer 1782); *id.* at 165 (Summer 1796); *id.* at 166 (Spring 1797).

200. Some anecdotal evidence of this attitude comes from the justices' treatment of Jennett Semple, who came before the bench charged with larceny at the April 1796 sitting of the quarter sessions. Semple pleaded guilty and was sentenced to one year at labor and in solitary confinement in the New Bayley Prison. *Id.* at 165 (Spring 1796). An apparently resourceful person, she was before the justices exactly one

IV. THE NEW VIEW OF CRIMINALITY

The true mystery of the reform, which theories of disease and war do not help us explain, is why Bayley and his contemporaries embraced correction as the purpose of punishment. The answer I will propose in this Part is that the reformers had concluded that correction *could* be the purpose of punishment—that is, that criminals *could* be corrected. This notion—not altogether new,²⁰¹ but never before embraced with such fervor—never fit with the image of criminality that dominated pre-reform penology. Before the reform, the law saw the criminal as an opportunist, pursuing crime for imagined rewards and best dissuaded by fear. Toward the end of the eighteenth century, a different image of a more passive criminal took hold. According to one increasingly prominent theory, the petty offenses of youth inexorably led, if not corrected early, to ever greater crimes. According to another, persons first learned the way of crime in the corrupt corners of the urban culture. Each of these theories pointed to the punishment of young offenders as an urgent priority, and each pointed to corrective imprisonment as an effective antidote to crime.

A. *Opportunistic Criminals: Deterrent Punishment*

Underlying the deterrent strategy of the Bloody Code was an image of the criminal as an opportunistic calculator. The judge who hanged a horse thief in order “that horses may not be stolen” imagined that horse thieves would see the fate of their mate upon the gallows, conclude that horse theft does not pay, and resolve to forgo the habit. Even as the Code grew increasingly unpopular during the eighteenth century, its most influential critics accepted the premise that criminals figured credits and debits in this way. In his *Essay on Crimes and Punishments*, first published in English in 1767, the Italian penal philosopher Beccaria argued that the law should not inflict more pain than was useful in deterring an opportunistic calculator:

That a punishment may produce the effect required, it is sufficient that the *evil* it occasions should exceed the *good* expected from the crime, including in the calculation the certainty of the punishment, and the privation of the expected advantage.²⁰²

year later at their April 1797 sitting, once again charged with petty larceny. This time Semple was convicted after trial and transported for seven years. *Id.* at 166 (Spring 1797).

Of course, as John Langbein pointed out in commenting on an earlier draft of this Article, the justices may have rewarded guilty pleas simply because they saved time. See Feeley & Lester, *supra* note 197, at 364–70 (arguing that trials became more complicated during 18th century).

201. See *supra* note 188 and accompanying text.

202. CAESAR BONESANA, MARQUIS BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 94 (photo reprint 1953) (Philadelphia, Philip H. Nicklin 1819) (1767).

Beccaria argued that because overly harsh laws were not consistently enforced, they were ineffective in deterring crime. Calculating criminals, especially optimistic ones, would be encouraged by the inconsistency of enforcement: "[F]or it is the nature of mankind to be terrified at the approach of the smallest inevitable evil, whilst hope, the best gift of Heaven, hath the power of dispelling the apprehension of a greater, especially if supported by examples of impunity" ²⁰³ In what became his most quoted words, Beccaria concluded that "[c]rimes are more effectually prevented by the *certainty* than the *severity* of punishment." ²⁰⁴

Beccaria was enormously influential in Britain, ²⁰⁵ and his image of the criminal as a calculator whom the law must terrify with inevitable evil was restated more than once. In his 1785 tract, *Thoughts on Executive Justice*, Martin Madan argued that because of its inconsistent enforcement, the Bloody Code had become a "scarecrow" to which the thieving crows had grown wise. ²⁰⁶ Josiah Dornford made the point through the words of an "old offender" explaining his "going on in that way":

"Ah! Sir . . . that's the very thing—there are so many chances for us, and so few against us, that I never thought of coming to this. First . . . there are many chances against being discovered—so many more that we are not taken—and if taken, not convicted—and if convicted, not hanged—that I thought myself very safe, with at least twenty to one in my favour." ²⁰⁷

Although Madan and Dornford reached opposite conclusions—Madan that the law should be more consistently severe, Dornford that it should be less severe but consistently so—they shared the belief that criminals could be deterred because they calculated the benefits and wages of crime.

Madan's image of the law as a scarecrow was not a random one. Crows are opportunistic thieves who rationally choose theft over honest foraging. They can be scared straight: They can appreciate the risk of being detected and shot. Yet they cannot be changed. They can be deterred from stealing corn, but they cannot be cured of the instinct. This image of an opportunistic, aboriginal criminal fits badly into a corrective penology. The technique of the New Bayley and other reformed prisons was not to scare onlookers and prove to them that crime does not pay, but to *change* the convict before the bar. For

203. *Id.* at 93.

204. *Id.*

205. Bayley and Clowes cite Beccaria in their 1783 report on the Manchester House of Correction. See CLOWES & BAYLEY, *supra* note 5, at 2.

206. MARTIN MADAN, THOUGHTS ON EXECUTIVE JUSTICE 8–19, 137–40 (London, J. Dodsley, 2d ed. 1785).

207. JOSIAH DORNFORD, SEVEN LETTERS TO THE LORDS OF THE PRIVY COUNCIL, ON THE POLICE 55–56 (London, J. Walter 1785). Madan prints the same account verbatim. MADAN, *supra* note 206, at 38–39.

this to happen, the convict must be changeable or, as Michel Foucault would have it, “docile.”²⁰⁸

Foucault suggests that a corrective prison *renders* inmates docile by enclosing them, separating them one from another, controlling their activity, putting them to work, constantly observing them, and holding out to them the reward of an early release if they prove to be docile enough.²⁰⁹ In his view the historical event that brought about the rise of the modern prison was the development of disciplinary analysis, which made possible the human sciences.²¹⁰ Among these are medicine, pedagogy, and psychology, each of which “impose[s]” docility and makes possible meticulous control of the body.²¹¹ The “penitentiary science” imposes docility by making the criminal’s soul the “point of application of the power to punish.”²¹² As the instrument of this imposed discipline, the prison naturally resembles each of society’s other disciplinary institutions: factories, schools, barracks, and hospitals.²¹³

Foucault’s fundamental insight that the new prisons were built to change criminals’ souls seems right. But his claim that the prison builders believed they had the power to *make* souls changeable obscures a fundamental transformation in the perception of criminality that gave way to the English reform movement. For Foucault does not suggest that the reformers saw anything new in the criminal soul. In the eyes of penal authorities, the criminal soul was always an apt “point of application of the power to punish,” if only the punishers could develop the necessary technology to render the soul docile. It was therefore a technological advance—the development of the “penitentiary science”—that led to the adoption of a new penal technique. The problem with this historical view is that the necessary technology was really not so exotic. Walls, Bibles, and looms were the tools of Howard’s regimen of solitary reflection, piety, and labor. They had long since been used (although without the elaboration of solitary confinement) in Britain’s bridewells and workhouses.²¹⁴ I suggest that the reformers reached the conclusion that criminal souls could be changed not because they suddenly happened upon the rather pedestrian techniques of the reformed prison, but because they were seeing the criminal soul in a new light. They had concluded that the criminal soul *was* docile.

208. FOUCAULT, *supra* note 11, at 136 (“A body is docile that may be subjected, used, transformed and improved.”).

209. *Id.* at 141–49, 231, 236–48.

210. *Id.* at 137–38, 226, 233.

211. *Id.* at 137, 256, 306.

212. *Id.* at 255.

213. *Id.* at 227–28.

214. See HIRSCH, *supra* note 188, at 13–20; LANGBEIN, *supra* note 188, at 35.

Michael Ignatieff has sought to explain why the reformers came to regard criminals as docile by seeking out the "ideological" roots of the reform.²¹⁵ In Wesleyanism Ignatieff sees the roots of Howard's belief in the universality of sin. Howard condemned himself as a "vile worm" with a "Body of sin and death" and a "poluted [sic] Soul."²¹⁶ Ignatieff argues that Howard saw his own reformation through good works as evidence of the possibility of reforming criminals in prison.²¹⁷ And Ignatieff suggests that Howard found a model for the reformation of criminals in the spiritual awakening of believers at Quaker meetings.²¹⁸

Ignatieff seems to realize that spiritual awakening and the universality of sin are hardly the kind of momentous insights of which social revolutions are born. He therefore looks beyond religion, initially to the advancing scientific understanding of sanitation. He suggests that the prison builders analogized the reform of the criminal soul to the hygienic reform of the body.²¹⁹ The analogy was more natural, he says, because Hartleian materialism and its embrace of mind/body unity made the philosophical climate right for the fusion of mind control and body control.²²⁰ Moreover, the materialism of Hartley and Locke, by rejecting the notion of innate ideas, made original sin seem implausible and the corrigibility of criminals more likely.²²¹ "Materialism," Ignatieff writes, "enabled prison reformers to ascribe criminality to incorrect socialization rather than to innate propensities."²²² Criminals who were the product of bad socialization could be corrected by proper socialization—by "systematic moral reeducation directed at the mind."²²³ That would be the mission of the reformed prison.

Although it is true that the reformers occasionally used language that sounded in materialism, one cannot convincingly assign to them any identifiable intellectual creed.²²⁴ Howard was by his own statement—and Ignatieff's admission—a "plodder,"²²⁵ while Bayley and other prominent

215. IGNATIEFF, *supra* note 12, at 44–79.

216. *Id.* at 51 (quoting Howard).

217. *Id.* at 55–56.

218. *Id.* at 58.

219. *Id.* at 59–60.

220. *Id.* at 60–61, 67.

221. *Id.* at 66–67.

222. *Id.* at 66.

223. *Id.* at 67.

224. For example, Bayley and Clowes wrote in their 1783 report on the old house of correction that "Cleanliness of Body is extremely favourable to Purity of Heart and Life." CLOWES & BAYLEY, *supra* note 5, at 4. But this was a mere slogan, one conveniently appropriated to support a point about fresh air and personal hygiene. Incidentally, Bayley and Clowes attributed this quote to one of Joseph Addison's (1672–1719) very popular essays originally published in the *Spectator*. *Id.* at 4 & n.1.

225. See JOHN AIKIN, A VIEW OF THE CHARACTER AND PUBLIC SERVICES OF THE LATE JOHN HOWARD, ESQ. 227 (London, J. Johnson 1792) (quoting Howard: "I am the *plodder*, who goes about to collect materials for men of genius to make use of."); see also IGNATIEFF, *supra* note 12, at 66 (same). Although professedly Howard's great friend, John Aikin felt himself "obliged . . . to assert, that [Howard] was never able to speak or write his native language with grammatical correctness." AIKIN, *supra*, at 13.

reformers like Paul, though intelligent men with intelligent friends, showed neither taste nor capacity for abstraction. Neither Howard, Bayley, nor Paul distinguished himself as a thinker, wrote deeply about punishment in the abstract, or showed any interest in the subject whatsoever until he assumed an office that carried with it the responsibility to run the prisons.²²⁶ Ignatieff deals with this philosophical void enveloping the reformers by arguing that the "Hartleian climate of belief . . . provide[d] the context necessary for the acceptance of Howard's disciplinary ideas."²²⁷ But it seems an odd explanation of a social revolution to say that the followers were inspired by an ideology the leaders did not share. It seems particularly odd in this instance, because the popularity of the Howardian reforms was deep, widespread, and transcended traditional political and religious boundaries. As Bayley wrote, there was a "general conviction in the minds of all ranks of people" on "the great Necessity of a speedy and thorough reformation of our prisons."²²⁸ An intellectual fad, like Hartleian materialism, hardly seems the likely explanation for so broad a social phenomenon as a new vision of criminality.²²⁹

B. *Passive Criminals: Corrective Punishment*

I suggest we look elsewhere than ideology and consider if a changing vision of *what* criminals were may not have been due to a changing vision of *who* they were, a vision rooted in the realities of social upheaval. At the time of the reform there were two widely stated and commonly accepted explanations of the roots of criminal behavior. The first of these held that the failure to punish a delinquent's first offense encouraged the commission of more and greater crimes. The second held that delinquents began their slide into crime not because they were intrinsically evil, but because they had learned crime in one of society's "seminaries of vice." Neither notion was altogether new, but both gained in prominence and credibility during these years. And although these explanations had general application to all criminals, both had particular relevance to the class of young criminals.

In 1788 the editor of *The Manchester Mercury* expressed the first of these theories as a cultural cliché: "[S]mall crimes lead to *gear*; and *Orchard*

226. Howard, Bayley, and Paul each served as high sheriff in his respective county. Bayley and Paul served as magistrates. DELACY, *supra* note 9, at 72; Moir, *supra* note 71, at 195, 199, 203.

227. IGNATIEFF, *supra* note 12, at 67.

228. MANCHESTER MERCURY, Mar. 27, 1787.

229. Ignatieff has since criticized the theory of the reform he put forth in *A Just Measure of Pain*, see Michael Ignatieff, *State, Civil Society and Total Institution: A Critique of Recent Social Histories of Punishment*, in LEGALITY, IDEOLOGY AND THE STATE 183, 185 (David Sugarman ed., 1983), but his self-critique leaves largely untouched the elements of his argument that I have discussed here.

robbing [is the] *first step* in the *Ladder of Vice*.”²³⁰ Bayley made the point with similar language in a 1799 address to local law enforcement officials:

[A]ctive endeavours to detect and bring to due punishment smaller offences, and early transgressions, will be the truest compassion:
 “For crimes lead to greater crimes,
 And what at first was accident,
 At last is fate.”²³¹

The idea that one’s first petty offense was the crucial first step down the slippery slope of crime was hardly new. Beattie quotes a colorful statement of the principle from a 1740 charge by Sir More Molyneux to the grand jury at the Surrey Quarter Sessions:

As no man is completely wicked at once, but becomes so insensibly by a Gradation of Wickedness, which would continually gain Strength by Impunity, till the Offender loosing all sense of fear and remorse, grows hardened to the Commission of Crimes of the deepest Dye, and Capital Crimes must be attended with Capital Punishments. Therefore, Gentlemen, to prevent these Consequences, the Wisdom of the Government has provided this Court of Quarter Sessions . . . to nip Offences in the Bud and deter Offenders by gentle Chastisements into a due sense of what they owe their King, their Country and themselves, before their Offences grow too extream.²³²

Sir More anticipated one of the motivating insights of the late eighteenth-century reformers: that early offenders, unlike “hardened” criminals, could yet be reclaimed by “gentle Chastisements.” In 1777 one of the more ardent proponents of reform, William Smith, echoed Sir More’s reasoning. “Habitual, daring and hardened wickedness,” Smith wrote, “is acquired insensibly, and by time, as other habits are formed; for man does not become desperately and

230. MANCHESTER MERCURY, Aug. 19, 1788. The editor is apparently alluding to Augustine’s confession that when he stole pears from a garden, he “leaped down from [God’s] firm clasp even towards complete destruction.” THE CONFESSIONS OF SAINT AUGUSTINE 70 (John K. Ryan trans., 1960). I thank Jim Whitman for this point.

231. BAYLEY, *supra* note 77, at 4. Howard subscribed to the same view:

Pilfering and stealing . . . naturally lead to the commission of more enormous offences; for, corrupt as our nature is, robbery and murder are seldom, if ever, the first crimes of the unhappy wretches who commit them; but when once persons have entered upon evil courses, they commonly advance by hasty steps, till they become totally depraved and abandoned to all kinds of wickedness.

HOWARD, LAZARETTOS, *supra* note 3, at 193 n.*.

232. BEATTIE, *supra* note 15, at 422 (quoting Loseley MSS 1066/3, fols. 1–3). For an example of 19th-century American prison reformers employing the slippery slope image, see DAVID J. ROTHMAN, THE DISCOVERY OF THE ASYLUM 73–74 (1971) (“Slight deviations, uncorrected, hurry the transgressor into a rapid downward course. . . . How many a young man . . . took, almost without a thought, the first step in that path” (quoting NEW YORK PRISON ASS’N, FIRST ANNUAL REPORT 34–35 (New York, New York Prison Ass’n 1845))); see also *id.* at 77 (recording contemporary sketches of young people’s progression to greater crimes).

obdurately wicked all at once.”²³³ Hence “the prudent and timely correction of slight offences, [will] prevent the commission of more enormous crimes.”²³⁴

As Sir More recognized, to “nip Offences in the Bud” requires an appropriately mild punishment. He apparently believed that the tariff of penalties available to the courts of quarter sessions included the sought-after “gentle Chastisements.” Most reformers disagreed. Most who argued that “*small crimes lead to great*” lamented that there existed no appropriate punishment for small crimes. Prison reformer Jonas Hanway complained in 1781 that Britain’s penal laws “do not distinguish the thief of *five shillings* from him who steals *five hundred pounds*; the young offender from the veteran robber; nor the murderer from the pick-pocket. *Death* is the word.”²³⁵ Henry Fielding made this point as early as 1753—and specifically in reference to petty larceny, the crime on which most of Bayley’s reform efforts focused and that was surely the first crime of many young delinquents. Transportation, Fielding complained, had “such an Appearance of extreme Severity” that courts refused to impose it. And whipping, he said, destroyed one’s reputation and *hardened* the offender—exactly the opposite of the intended effect.²³⁶ Blackstone,²³⁷ Howard,²³⁸ and Eden²³⁹ all believed that the excessively severe penalties prescribed for most crimes weakened deterrence, because judges and juries could not stomach imposing those penalties on minor criminals who committed petty offenses.²⁴⁰

The reformers believed that prosecutors—that is to say, crime victims—were deterred from bringing charges by the fear that they might be responsible for calling the law’s wrath down upon some poor urchin who stole a few apples or a handkerchief. Fielding scolded prosecutors for their “Tenderheartedness,”²⁴¹ Blackstone for their “compassion.”²⁴² In 1777 the

233. WILLIAM SMITH, *MILD PUNISHMENTS SOUND POLICY* 27 (London, J. Bew, 2d ed. 1778) (1st ed. 1777).

234. *Id.* at 13.

235. JONAS HANWAY, *DISTRIBUTIVE JUSTICE AND MERCY* 44 (London, J. Dodsley 1781).

236. See HENRY FIELDING, *A PROPOSAL FOR MAKING AN EFFECTUAL PROVISION FOR THE POOR* 43–44 (Dublin, John Smith 1753) (discussing destruction of criminal’s character caused by excessive punishment of petty offenses).

237. See 4 WILLIAM BLACKSTONE, *COMMENTARIES* *18–19 (“[J]unes, through compassion, will sometimes forget their oaths, and either acquit the guilty or mitigate the nature of the offence: and judges, through compassion, will respite one half of the convicts, and recommend them to the royal mercy.”).

238. See HOWARD, *LAZARETTOS*, *supra* note 3, at 221 (“Our present laws are certainly too sanguinary, and are therefore ill executed; which last circumstance, by encouraging offenders to hope that they might escape punishment, even after conviction, greatly tends to increase the number of crimes.”)

239. See EDEN, *supra* note 186, at 14 (“Legislators should then remember, that the acerbity of justice deadens its execution; and that the increase of human corruption proceeds, not from the moderation of punishments, but from the impunity of criminals.”).

240. See also SMITH, *supra* note 233, at 7 (“[B]y the nature of our law, a criminal must escape without any punishment, or undergo a sentence too grievous and severe for the offence.”)

241. HENRY FIELDING, *AN ENQUIRY INTO THE CAUSES OF THE LATE INCREASE OF ROBBERIES* 81–83 (Dublin, G. Faulkner 1751).

242. 4 WILLIAM BLACKSTONE, *COMMENTARIES* *18.

Mercury published this apology by three young housebreakers, tendered to a forgiving crime victim in lieu of prosecution and its likely severe consequences:

Whereas, We Charles Bradshaw and John Read, Barbers, with John Jackson, Hatter, all of the Town of Manchester, Apprentices, did on Thursday Night the 7th of November last, forceably enter the House of Mr. James Wood of Deansgate, and ill-used some Part of that Family, broke the Windows, and committed other Enormities, for which we acknowledge we lay open to the Law; but in Consideration of our Youth, and a Promise of a determined Resolution in us never to do the like again, also begging Pardon of the said Family, Mr. Wood has generously stopt all Proceeding, on our advertizing this to deter other Youths from such Practices, as they may not meet with the like Lenity under similar Circumstances.²⁴³

This letter is perhaps unusual both in the seriousness of the offense involved and in the clarity of the victim's motive in not pressing charges, but it is surely typical in its result. In the years before the reform most crimes by youths were punished, if at all, through informal, extrajudicial disciplinary mechanisms.²⁴⁴

Many commentators saw this impunity of youth as confirmation of Beccaria's principle that the severity of the law undermines its certainty and leads to greater crimes. William Eden stated the principle in 1771:

The delinquent therefore is discharged without prosecution; he repeats the crime, under the expectation of repeated mercy; he becomes gradually familiar with dishonesty; and at length falls a victim to that preposterous severity of the law, which hath so long been the subject of his mockery.²⁴⁵

Josiah Dornford repeated the principle in 1785:

The uncertainty of men being punished is undoubtedly the cause of multitudes going on from bad to worse, until they fill up the measure of their iniquities, and become victims to those laws, which, if they had been certain of their execution, they would not have dared to violate.²⁴⁶

Indeed, the truth of the general principle was recognized long before Beccaria. Samuel Johnson wrote in 1751 that "multitudes will be suffered to advance

243. MANCHESTER MERCURY, Jan. 21, 1777.

244. See IGNATIEFF, *supra* note 12, at 29 (comparing enforcement mechanisms used by employers to measures taken by fathers to discipline their sons).

245. EDEN, *supra* note 186, at 291.

246. DORNFORD, *supra* note 207, at 56; see also GEORGE O. PAUL, AN ADDRESS TO THE MAGISTRATES OF THE COUNTY OF GLOUCESTER 22 n.*, 24 n.* (Gloicester, R. Raikes 1789) (stating that *certainty* of punishment rather than *harshness* of punishment ensures deterrence).

from crime to crime, till they deserve death, because, if they had been sooner prosecuted, they would have suffered death before they deserved it."²⁴⁷

From the insight that the law's great severity impeded the punishment of minor offenses, it was a short step to the conclusion that a new penal technique was needed, one that could be modulated downward in severity to correspond to young criminals' petty offenses. Broader use of imprisonment was an obvious solution. Henry Fielding so argued in 1753,²⁴⁸ as did William Paley, otherwise a stern defender of the Bloody Code, in 1785.²⁴⁹ In 1781, reformer Jonas Hanway wrote: "[J]udges, or *juries*, who now acquit a prisoner, not knowing in what manner to chastise him for his offences, because he does not deserve a punishment, according to the rigour of the law, may, with legal authority, and equal humanity, condemn him to a short imprisonment"²⁵⁰ The idea that the new prisons would serve to provide a gentle chastisement for minor crimes was expressed not merely by theorists like Hanway, but by the prison builders themselves. Paul wrote that it is "by Correction of the smaller Crimes that the greater are prevented," and it is therefore a "mistaken Lenity" to "consider great Criminals as the only Objects of Attention":

Few men have been hanged for a Felony, that might not have been saved to the Community by Correction of a former Misdemeanour;—there is in every Man an innate Respect for Law, which he never violates by the first Offence, without a Compunction that leaves his Mind open to Correction;—encouraged by Impunity,—he proceeds to Repetitions, which gradually prepare his Mind for the Commission of enormous Crimes.²⁵¹

Paul held that houses of correction were intended to "check the early dawns of vice and . . . to punish and discourage incipient offenders."²⁵²

In Manchester, Bayley explained the need for a new prison in much the same terms. In a 1785 charge to the grand jury of the Salford Quarter Sessions,²⁵³ he announced and defended the magistrates' recent decision to build a new prison on the Howardian model. First, he explained how the

247. 3 RAMBLER 18 (1809 ed.), *quoted in* 1 RADZINOWICZ, *supra* note 17, at 37

248. See FIELDING, *supra* note 236, at 43–44 (recommending imprisonment instead of whipping or banishment as punishment for petty larceny).

249. See PALEY, *supra* note 35, at 349–52 (recognizing solitary imprisonment as alternative to execution for some crimes).

250. HANWAY, DISTRIBUTIVE JUSTICE, *supra* note 235, at xi–xii.

251. PAUL, *supra* note 7, at 49–50.

252. BRITISH PARLIAMENTARY PAPERS, REPORT FROM THE SELECT COMMITTEE ON GAOLS AND OTHER PLACES OF CONFINEMENT, 1 PRISONS 401 (Irish Univ. Press, photo. reprint 1968) (1819) (testimony of Sir G.O. Paul) [hereinafter Testimony of Sir G.O. Paul]. Paul had a different idea about the purposes of gaols and penitentiaries. See *infra* notes 393–96 and accompanying text.

253. T.B. Bayley, *Extracts from a Charge Delivered to the Grand Jury at the Quarter Sessions at Manchester, July 21st, 1785*, MANCHESTER MERCURY, Aug. 9, 1785.

reluctance of crime victims and witnesses to come forward leaves many minor offenses unpunished:

That false Principle of Tenderness or Fear . . . prevents Men from becoming Informers against Offenders, and lending their required Assistance in the execution of those Laws which have provided adequate Punishments for *smaller* Offences. Thus Impunity becomes the great source of Crimes.²⁵⁴

He then proceeded in the next paragraph to identify the punishment of "early Transgressions" as the purpose of the intended new prison:

If the ends of Punishment be justice, and not revenge—Reformation, and not Destruction—it will be at once a Proof of our Wisdom and Humanity, to detect, and punish *with Severity*, early Transgressions, and what are very improperly disregarded as comparatively of little Importance. On this ground, Sir William Blackstone says, "Preventive Justice is on every principal of Reason, of Humanity, and of sound Policy, preferable in all respects to punishing Justice."²⁵⁵

Like Paul and many theorists of the reform, Bayley had modest expectations for the reforming powers of the new prisons. He did not expect that the New Bayley would convert hardened offenders into model citizens. He hoped only that it would serve to correct a young offender who had fallen but a short way down crime's slippery slope. Indeed, imprisonment seems generally to have been reserved as a punishment for minor offenders. Until the late 1840's, when the government began to abandon transportation, most serious felons were transported or hanged, and most prison sentences were six months or less.²⁵⁶

The image of the slippery slope goes some distance toward explaining the adoption of a corrective penology that offered a mild tariff of punishments appropriate to the minor offenses of the young. But two questions remain: First, why should imprisonment have been the chosen means of punishment? After all, whipping would have been a more obvious choice, one more analogous to the traditional mode of punishing wayward children. And second, given that the inadequacies of Britain's overly severe penal code were neither new nor newly discovered, why did the forces for change suddenly reach critical mass in the 1770's and 1780's? This latter question about timing will be the subject of Part V. To explain why imprisonment was the selected mode

254. *Id.*

255. *Id.* It is interesting that Bayley emphasized that the new prison would allow early transgressions to be punished "*with severity*." His other rhetoric makes clear that he followed his contemporaries in reasoning that the value of the new prisons was that they provided a less severe punishment for minor crimes. Bayley may have meant that imprisonment would be severe in contrast to the impunity that young criminals often enjoyed. Or he may have been making a political point: that the new prison would not coddle criminals.

256. See IGNATIEFF, *supra* note 12, at 201.

of punishment, it is helpful to examine contemporary theories of what led youngsters to take that first, fateful step down the slippery slope.

Margaret DeLacy has argued that the Salford bench of Bayley's era displayed "a particular preoccupation with the maintenance of godliness and public order."²⁵⁷ She noted that the Salford bench stood out in the fervor with which it hailed the King's 1787 proclamation "for preventing Vice, Profaneness and Immorality."²⁵⁸ The King had directed local magistrates and other crown officers to act vigilantly against all those "guilty of excessive Drinking, Blasphemy, profane Swearing and Cursing, Lewdness, Profanation of the Lord's Day, or other dissolute, immoral, or disorderly Practices."²⁵⁹ Bayley and eight other justices declared the "Necessity of a strict Compliance" with the King's directives.²⁶⁰ Indeed, as J.M. Beattie has noted, the reform era was characterized throughout England by a preoccupation with vice and the conviction that "crime seemed to derive from a spreading immorality."²⁶¹ By the late eighteenth century, "vice" and "immorality" had taken on new significance. What had once been regarded as venal sins came to be seen as the precursors to real crime. Bayley wrote in 1785, "It is said, and with some degree of Truth, that those Persons who can set at defiance the more important obligations of Religion and the fear of God, will not pay a due regard to human Authority."²⁶² In 1789, the Philanthropic Society, formed for the prevention of crimes by youths, referred to vice as the "seeds" of crime and berated the shortsighted policy of "permitting every vice of every kind to spread and be propagated without controul, and punishing only crimes which are necessary consequences of vice."²⁶³

In a sense, vice was to the community what that first, most petty crime was to the individual. As small crimes led to greater crimes in the individual, so vice led to crime in the society. Bayley and other social observers perceived the individual and the community to be perched atop the same slippery slope and believed that individuals could be caught up in society's vices and swept down the inexorable slope to crime. Young persons and persons without moral guidance were seen to be particularly vulnerable. A 1788 correspondent to *The*

257. DELACY, *supra* note 9, at 73. On the King's proclamation and its enthusiastic reception elsewhere, see Joanna Innes, *Politics and Morals: The Reformation of Manners Movement in Later Eighteenth-Century England*, in *THE TRANSFORMATION OF POLITICAL CULTURE: ENGLAND AND GERMANY IN THE LATE EIGHTEENTH CENTURY* 57, 76-79 (Eckhart Hellmuth ed., 1990).

258. DELACY, *supra* note 9, at 73.

259. Proclamation of George III, reprinted in *MANCHESTER MERCURY*, July 17, 1787.

260. See L.C.R.O., QSO/2, *supra* note 41, at 156 (Summer 1787).

261. BEATTIE, *supra* note 15, at 629-30. Beattie explains an earlier era of penal reform in much the same terms. He argues that in the late 17th and early 18th centuries the idea took hold that crime could be prevented by reforming the manners of the poor. Imprisonment at hard labor was proposed as the means of this reform. *Id.* at 492-506; see also HIRSCH, *supra* note 188, at 22 & n.92 (finding examples of notion that vice leads to crime in 17th and early 18th centuries).

262. Bayley, *supra* note 253.

263. PHILANTHROPIC SOCIETY, *THE SECOND REPORT AND ADDRESS OF THE PHILANTHROPIC SOCIETY* 23 (London, T. Becket 1789) [hereinafter PHILANTHROPIC SOCIETY (Second Report)].

Manchester Mercury argued for the abolition of cockfighting, one of the town's most popular vices, because of its power to make criminals of the town's youths:

Great attention should be paid to the early habits of children; and they should be commended or corrected, according as they act well or ill, in the instance before us. Cruelty, like other vices, steals upon human nature by slow and imperceptible degrees. The practice of the child corrupts the principles, and hardens the heart of the man; and what is begun in wantonness, may end in murder.²⁶⁴

Jonas Hanway described in elaborate detail how a previously virtuous youth could be corrupted by a town's vices, especially when bereft of moral guidance:

He is not yet *nineteen years of age*! Poor lad!— With a small portion of instruction he might have had a better fate; but his parents are worthless people, and took no care of him. There is no school in the village where he was born. Divine service at church is partially performed, not being on every Sabbath-day. . . . This lad came to town a year ago. He is comely in his person, and being unawed by any principle founded in sober discipline; it is easy to conceive with what facility he became the prey of one of the great number of prostitutes, who throng among many of our streets. The little money he had acquired in servitude being spent, his active, lively temper, and knowledge of horsemanship, induced him to try his wits on the road. He robbed a gentleman of *two guineas*, for which offence he is now on the way, to pay the forfeiture of his life. . . . With some variation of circumstances, this is the case of the majority of young men who are hanged, *hulked*, or transported!²⁶⁵

Hanway's focus on the absence of moral instruction, formal schooling, and worship is especially significant. I noted earlier that two theories of the sources of criminality took hold in the later eighteenth century. The first was the notion of the slippery slope of crime. The second was the idea that society was riddled with "seminaries" of vice. The concern with vice was not merely that it hung in the air and infected people as they breathed, but that it was actively *taught* to those who were vulnerable to its lessons. The most vulnerable, of course, were young people. As Hanway recognized, the most vulnerable of all young persons were those who had no other education and no moral guidance.

264. Letter to the Publisher, MANCHESTER MERCURY, Jan. 29, 1788. The publisher of the *Mercury* commented in 1787 that cockfighting has "a natural Tendency to render the Minds of young Persons callous and insensible to the feelings of Compassion and Humanity, and consequently and by Degrees, render them capable of Acts of Barbarity." MANCHESTER MERCURY, Feb. 20, 1787. A 1786 correspondent made a similar point with regard to other animal sports. Letter to the Publisher, MANCHESTER MERCURY, Feb. 28, 1786.

265. HANWAY, DISTRIBUTIVE JUSTICE, *supra* note 235, at 61–62.

The most obvious and prevalent seminaries of vice were alehouses. In 1758, John Fielding identified "Public-Houses" and "Bawdy-Houses" as the "Fountains that furnish the Courts of Justice with Offenders, and the Place of Execution with Victims."²⁶⁶ Fielding cited as proof the great number of boys, aged fourteen to eighteen, who were prosecuted for pickpocketing and pilfering.²⁶⁷ Hanway lamented England's profusion of alehouses—there were as many as 70,000, he said.²⁶⁸ In 1776, the *Mercury* republished a remarkable passage by John Disney, a justice of the peace in Lincolnshire, explaining how the lessons taught in the alehouse start one down the slippery slope:

Vice, Profaneness, and Immorality, in all their varied Shapes, most frequently take their rise from small, and almost imperceptible Beginnings. Corrupt as we are by Nature, Murder and Robbery are seldom, if ever, the first outlets of the unhappy Wretch who commits them. He has learned, in some School of Vice, the Lessons and the Habits which lead to Idleness and Dissipation. Hence we may frequently Date the Commencement of those Practices which are closed only by a premature and disgraceful Death; And hence the frequent Riots and Disturbances in Villages, as well as greater Towns, and the gross Profanation of the Lord's day, all which owe their rise, generally speaking, to unnecessary and ill-timed Meetings at Public-Houses²⁶⁹

Disney urged justices of the peace to exercise discretion in granting licenses to "these nurseries and seminaries of distress and wretchedness; of vice and felonies."²⁷⁰ Bayley took note of Disney's commentary. In 1785, Bayley and his colleagues reprinted Disney's letter in the *Mercury* and announced their resolve to examine the character of those to whom licenses were granted.²⁷¹ Throughout our period the bench restated its determination to regulate the

266. JOHN FIELDING, AN ACCOUNT OF THE ORIGIN AND EFFECTS OF A POLICE 41 (London, A. Millar 1758).

267. *Id.* at 41–48.

268. JONAS HANWAY, THE DEFECTS OF POLICE, THE CAUSE OF IMMORALITY, AND THE CONTINUAL ROBBERIES COMMITTED, PARTICULARLY IN AND ABOUT THE METROPOLIS 24 (London, J. Dodsley 1775).

269. JOHN DISNEY, THOUGHTS ON THE GREAT CIRCUMSPECTION NECESSARY IN LICENSING PUBLIC ALE-HOUSES 3–4 (London, J. Johnson 1776), reprinted in *MANCHESTER MERCURY*, Sept. 17, 1776.

270. *Id.* at 6.

271. *MANCHESTER MERCURY*, Sept. 13, 1785.

number and nature of Manchester's alehouses,²⁷² and indeed the bench seems to have had some success.²⁷³

Alehouses were not the only seminaries of vice perceived to be at work in late eighteenth-century society. Bayley and his colleagues sought to limit cockfights²⁷⁴ and called on good citizens to suppress brothels.²⁷⁵ (Howard, too, disliked both public houses and cockfights.²⁷⁶) These notorious examples hardly exhaust the list. In fact, in the eyes of community leaders, any place where people gathered and vice flourished could be the site of evil education and the corruption of youth. Hence this complaint in 1784 by the boroughreeve and constables of Manchester:

The hardest Heart must melt at the melancholy Sight of such a Multitude of Children, both Male and Female, in this Town, who live in gross Ignorance, Infidelity, and habitual Profanation of the Lord's Day. What Crowds fill the Streets! tempting each other to Idleness, Play, Lewdness, and every other Species of Wickedness.²⁷⁷

Even the streets of the town served as seminaries of vice. As Bayley observed, "multitudes of *children, of tender age, are regularly trained amongst us*, in the practices of fraud and robbery."²⁷⁸

It is not difficult to see how the image of criminals as the victims of a vicious education suggested a reforming prison as the proper means of punishing crime. After all, one who is taught to do wrong presumably can be retaught to do right. Seminaries of vice do not turn out evil persons, nor do

272. In 1777, the bench endorsed a proposal that alehouse licenses be granted only to persons of good moral standing. MANCHESTER MERCURY, Aug. 5, 1777. In 1786, the magistrates determined not to grant licenses to alehouse keepers who allowed drinking after midnight Saturday or who tolerated disturbances on Sunday evenings. MANCHESTER MERCURY, Sept. 26, 1786. The next year they said they would limit new licenses to those proposed alehouses that "really and evidently appear to be necessary for public Utility and Convenience." MANCHESTER MERCURY, Sept. 18, 1787. And, in 1788, they announced they would not renew the license of any alehouse in which a crime was planned unless the landlord had revealed the unlawful rendezvous to authorities. MANCHESTER MERCURY, Sept. 23, 1788. Social reformers throughout England led efforts in the 1780's to tighten alehouse regulations. See PETER CLARK, *THE ENGLISH ALEHOUSE: A SOCIAL HISTORY* 254-60 (1983).

273. In 1774, Thomas Percival wrote that at least 193 licensed alehouses served Manchester's 27,000 inhabitants. See PERCIVAL, *supra* note 29, at 3, 40 n.a. In 1795, Sir Frederic Eden counted only 238 alehouses in the town, although during the intervening period the town's population had more than doubled. Indeed, Eden remarked how few alehouses Manchester had in comparison with Liverpool. See 2 EDEN, *supra* note 63, at 358.

274. They resolved not to grant licenses to innkeepers or alehouse keepers who encouraged cockfighting on the premises. See MANCHESTER MERCURY, May 7, 1782; MANCHESTER MERCURY, Sept. 26, 1786.

275. See MANCHESTER MERCURY, Aug. 8, 1786.

276. See HOWARD, LAZARETTOS, *supra* note 3, at 173-74 n.* ("The great and increasing number of ale-houses . . . is one great and obvious reason why our prisons are so crowded both with debtors and felons."); IGNATIEFF, *supra* note 12, at 48.

277. MANCHESTER MERCURY, Aug. 10, 1784; see also [DENNE], *supra* note 23, at 45 ("[I]t appears very evident to me, that there is a broad and well beaten passage from places of public diversion . . . to a prison."); *id.* at 68 (proposing tax on places of public diversion to pay for prisons).

278. BAYLEY, *supra* note 77, at 3.

they turn out rational calculators who may be deterred from their evil ways by the threat of punishment. They turn out miseducated persons—"innocent victims" in the words of one commentator²⁷⁹—who if not yet hardened in the habits of vice, may yet be successfully reeducated. In *The Discovery of the Asylum*, David Rothman argues that similar beliefs about the etiology of crime in the individual led to the adoption of corrective prisons in Jacksonian America:

Since the convict was not inherently depraved, but the victim of an upbringing that had failed to provide protection against the vices at loose in society, a well-ordered institution could successfully reeducate and rehabilitate him. The penitentiary, free of corruptions and dedicated to the proper training of the inmate, would inculcate the discipline that negligent parents, evil companions, taverns, houses of prostitution, theaters, and gambling halls had destroyed. Just as the criminal's environment had led him into crime, the institutional environment would lead him out of it.²⁸⁰

In America, as in Britain, social leaders adopted prisons as a means to remove offenders from society's vicious influences and to reeducate and reform them.

The irony of the choice of prisons as the antidote to seminaries of vice is that prisons had long been regarded as society's premier institution of criminal learning. Bernard Mandeville wrote in 1725 that Newgate's inmates spent "[t]heir most serious Hours . . . reading Lectures on some Branch or other of their Profession."²⁸¹ Henry Fielding branded all prisons "no other than Schools of Vice [and] Seminaries of Idleness."²⁸² "One [prisoner] teaches lewdness and theft," wrote William Smith, "the other the art of picking locks

279. Hewling Luson, *Inferior Politics: Or, Considerations on the Wretchedness and Profligacy of the Poor . . . on the Defects in the Present System of Parochial and Penal Laws* (1786), in *JUVENILE OFFENDERS FOR A THOUSAND YEARS: SELECTED READINGS FROM ANGLO-SAXON TIMES TO 1900*, at 67, 68 (Wiley B. Sanders ed., 1970) [hereinafter *JUVENILE OFFENDERS*].

280. ROTHMAN, *supra* note 232, at 82–83. Rothman reports that New York prison inspectors, recording the life stories of inmates in 1829 and 1830, managed in most cases to locate the roots of criminality in childhood. *Id.* at 64–70. He concludes from this and other evidence that Jacksonian prison builders, like Bayley and his contemporaries, believed that youths were peculiarly susceptible to the vicious influences in society. *Id.* at 71–76, 210. Rothman explores many of the same links between the adoption of a reforming penology and the problem of juvenile crime that I develop here. He does not argue, as I do, that the reformers' focus on the particular problem of young criminals helps largely to explain the nature of the new reforming institutions and the timing of the reform.

Adam Hirsch has shown that America's first corrective prisons date to the 1780's—not to the Jacksonian era. Hirsch argues that a governing ideology of these institutions was that idleness bred crime and that hard labor could "rehabilitate" criminals to lawfulness. HIRSCH, *supra* note 188, at 23–28, 30–31, 59–60.

281. BERNARD MANDEVILLE, *AN ENQUIRY INTO THE CAUSES OF THE FREQUENT EXECUTIONS AT TYBURN* 17 (London, J. Roberts 1725). At least one of Mandeville's contemporaries generalized the point to all prisons: "A prison is a place fitter to make a rogue than to reform him." LONDON J., Mar. 19, 1726, quoted in WEBB & WEBB, *supra* note 6, at 21.

282. FIELDING, *supra* note 236, at 47. A contemporary of Fielding called Clerkenwell Bridewell a "seminary of wickedness." See WEBB & WEBB, *supra* note 6, at 22 (quoting 1757 edition of *Gentleman's Magazine*).

and house-breaking, while the highwayman makes both acquainted with the mystery of his trade; and the felon leaves a gaol qualified, as occasion offers, for any branch of his iniquitous calling."²⁸³ For Howard, Bayley, Hanway, and Paul, however, the problem was not confinement per se, but the indiscriminate mixing of hardened and youthful offenders, which allowed the former to instruct the latter in the culture of crime. Nowhere in *The State of the Prisons* does Howard display such trembling rage as when he describes the common yards he observed in many of his country's prisons:

There the petty offender is committed for instruction to the most profligate. In some gaols you see (and who can see it without sorrow) boys of twelve or fourteen eagerly listening to the stories told by practiced and experienced criminals, of their adventures, successes, stratagems, and escapes.

... Multitudes of young creatures, committed for some trifling offence, are totally ruined there. I make no scruple to affirm, that if it were the wish and aim of magistrates to effect the destruction present and future of young delinquents, they could not devise a more effectual method, than to confine them so long in our prisons, those seats and seminaries (as they have been very properly called) of idleness and every vice.²⁸⁴

"How contrary this [is]," Howard wrote, "to the intention of our laws with regard to petty offenders; which certainly is to correct and reform them!"²⁸⁵ In their 1783 report Bayley and Clowes said the mixing of prisoners made some prisons "wretched *Schools* of Wickedness, where many Persons, (especially of tender Years, as yet not hardened or profligate,) are *nominally* sent for Correction for trifling Crimes, but in *fact* are doomed to *Destruction*."²⁸⁶ Hanway urged that "veteran villains" be kept from the "young in iniquity."²⁸⁷ And Paul's first step in his program of reform was to separate the various classes of prisoners. He scolded those justices "who generalize the act of commitment; who think that if they send an offender of *any kind* to a prison of *any kind*, and if they see that he is not starved, and that he is punished when he gets there, the whole duty of the individual magistrate is performed."²⁸⁸ "[W]e should not see the hardened offender," Paul warned, "instructing young and ignorant Offenders in Acts that brought him to his

283. SMITH, *supra* note 233, at 36. The title page of Samuel Denne's *Letter to Sir Robert Ladbroke* quotes from *Hamlet*: "Do not spread the Compost on the Weeds/ To make them ranker." [DENNE], *supra* note 23; see also *id.* at 30–37, 81 (elaborating on "academies of wickedness").

284. HOWARD, PRISONS, *supra* note 3, at 8, 10–11.

285. *Id.* at 10.

286. CLOWES & BAYLEY, *supra* note 5, at 2.

287. JONAS HANWAY, *THE CITIZEN'S MONITOR* at vi (London, J. Dodsley 1780).

288. GEORGE O. PAUL, *A STATE OF THE PROCEEDINGS ON THE SUBJECT OF A REFORM OF PRISONS WITHIN THE COUNTY OF GLOUCESTER* 5 (1783), *quoted in* Moir, *supra* note 71, at 206.

condemnation We should not see the young Offender . . . listening to the experienced Tale that confirms him in his Infamy”²⁸⁹

Barely hidden in these passages is the frank acknowledgment that some criminals were indeed beyond reformation: The “practiced and experienced,” the “hardened and profligate,” the offenders (in Paul’s cryptic phrase) “of *any kind*” were not the target of the new prisons’ reforming mission. Instead, those offenders hardened beyond correction must be kept away from those whom the reformers hoped to reform, distinguished either by their age (the “young creatures,” those “of tender years”) or by their offense (the “petty” or “incipient” offenders or those “committed for some trifling offence”). The point is made quite explicit in the second report of London’s Philanthropic Society, published in 1789:

By whatever steps, and from whatever causes this class of people were formed, it is but too certain that the adult among them, are, by habit, become irreclaimable.

Their children, nurtured in the midst of infamy, in time, acquire the same incorrigible habits. But, *there is a period of tender youth when these baneful propensities have either not begun to take root, or are not yet ineradicable.* There is a period in which the human form divine is not obscured with hellish darkness.

At this critical opportunity, if lost, never to be redeemed, the common parent should seize and rescue it’s [sic] devoted children.²⁹⁰

The reforming prison therefore emerged as a means of offering a corrective reeducation to those who had been taught the ways of crime in society’s many seminaries of vice, but only to those students caught at the “critical opportunity,” who had fallen but a short way down crime’s slippery slope and who were yet susceptible to the corrective regimen of solitary reflection, piety, and labor. The reforming prisons were intended, in the main, for the young. Why the reformers did not state this focus of purpose in more explicit terms—why they did not, for example, put a maximum age on convicts sent to the new prisons—will be the topic of Part VI.

It is important now to address the question of timing. I have argued that the new prisons were built in large part to remedy the failure of the old system to redress the crimes of youth. Because the old penalties—primarily whipping, transportation, and hanging—were perceived to be overly severe or inappropriate, the crimes of the young often had gone unpunished or were punished only by parents or trade masters. Bayley and other reformers

289. PAUL, *supra* note 7, at 8–9. Wayne Sheehan reports that “[t]here were no serious attempts to separate young offenders from hardened malefactors [in London’s prisons] until 1779” Sheehan, *supra* note 18, at 181.

290. PHILANTHROPIC SOCIETY (Second Report), *supra* note 263, at 24–25

endeavored to bring the punishment of juvenile crime within the criminal justice system. For that they needed an appropriate penalty. A prison regimen of solitary reflection, piety, and labor filled the need, because it both took advantage of the plasticity of young minds and responded directly (by providing a corrective moral reeducation) to the perception that young persons were taught crimes in society's seminaries of vice.

But if all this is true, then why did the reform movement erupt when it did, beginning in the 1770's and peaking in the 1780's? Beattie has demonstrated convincingly that the ideas of the reform were not new. Proposals were made early in the century for greater reliance on imprisonment and corrective penology. Beattie has also shown that such proposals responded to heightened concern about vice and the immorality of the poor.²⁹¹ Yet these earlier suggestions for reform had little lasting impact. Something must have changed in Britain by the end of the century to create a receptive climate for proposals to punish criminals, especially young criminals, by a corrective reeducation in prison. I will argue in the next Part that this change was the sudden growth of collectivized child labor in the last decades of the eighteenth century.

V. CHILD LABOR AND THE ESTABLISHMENT OF SUNDAY SCHOOLS

History has generally classified child factory labor as a problem of the nineteenth century. This is so no doubt because the enormous steam-powered textile complexes that made for such colorful denunciations of the greed of their owners and the cruelty of their labor practices did not begin to dominate the industrial landscape until the 1790's. The notoriety of these mammoth complexes prompted Parliament's famous 1816 inquiries into the child labor problem.²⁹² Long before such steam-driven mills belched smoke over Manchester's cityscape,²⁹³ however, collectivized production transformed the nature of industry and the lives of many of the town's youths. The evidence is unmistakable that child labor became more and more common during the late eighteenth century and was widely recognized by the early 1780's as a moral threat.²⁹⁴

291. See BEATTIE, *supra* note 15, at 492-500; see also *supra* note 190 and accompanying text.

292. See 1 GRACE ABBOTT, *THE CHILD AND THE STATE* 117 (1938).

293. Manchester's first steam-powered spinning mill, built by Richard Arkwright in 1780 or 1781, appears to have begun operating by 1783. See R.S. FITTON & A.P. WADSWORTH, *THE STRUTTS AND THE ARKWRIGHTS, 1758-1830: A STUDY OF THE EARLY FACTORY SYSTEM* 84 (1958); [JAMES OGDEN], *DESCRIPTION OF MANCHESTER* 16 (Manchester, C. Wheeler 1783); WADSWORTH & MANN, *supra* note 31, at 489.

294. Per Bolin-Hort has concluded that the proportion of child laborers during this early period was greater than at the time of Parliament's 1816 hearings on the subject. See PER BOLIN-HORT, *WORK, FAMILY AND THE STATE* 35, 40 (1989).

The focus on large steam-powered textile plants is mistaken on two grounds. First, industries other than textiles got an early start on the exploitation of child laborers. For example, pinmaking—Adam Smith's paradigm of divided labor—required an unskilled workforce and therefore profitably exploited cheap child labor. In 1777 a Manchester pinmaker²⁹⁵ posted the following ad:

Employment for Boys & Girls. WANTED Immediately, A Number of CHILDREN from 10 to 14 Years of Age. Those Persons who are desirous of having their Children (particularly Girls) learn a Business, by which may be got a decent Livelihood when grown up, and have handsome Wages while instructing, may apply to *J. Meredith, Salford-Bridge, Manchester*, who will treat with Parents upon Terms that will be advantageous to them.²⁹⁶

A month later Meredith advertised for eight- to eleven-year-olds.²⁹⁷

Second, and more important, the historic boom in textile production began well before the advent of steam-powered mills.²⁹⁸ Within Manchester's limits, children spun cotton by hand in collectivized mills.²⁹⁹ Outside the town, children staffed water-powered mills built along fast-running streams.³⁰⁰ The distance of these country water mills from a ready source of labor added a disturbing facet to the child labor problem. Not only in Manchester but throughout Britain, the migration of city children to country cotton mills separated offspring from parents and orphans from church wardens. The result was an unseemly yet wide-open traffic in friendless children. A labor system emerged that lacked the moral protections built into the old apprenticeship system.³⁰¹ In Manchester the large-scale employment of parish apprentices prompted accusations of "Oppression" and "Slavery" as

295. See MANCHESTER MERCURY, Nov. 3, 1778 (identifying James Meredith as pinmaker).

296. MANCHESTER MERCURY, Oct. 7, 1777.

297. MANCHESTER MERCURY, Nov. 4, 1777.

298. The boom was fueled by several critical inventions, including Hargreave's spinning jenny (1765), Arkwright's water frame (1769), and Crompton's spinning mule (1779). See J.L. HAMMOND & BARBARA HAMMOND, *THE SKILLED LABOURER 1760-1832*, at 50-51 (Augustus M. Kelley 1967) (1919).

299. See W.H. Chaloner, *Robert Owen, Peter Drinkwater and the Early Factory System in Manchester, 1788-1800*, 37 BULL. JOHN RYLANDS LIBR. 78, 86-87 n.5 (1954).

300. See CLARK NARDINELLI, *CHILD LABOR AND THE INDUSTRIAL REVOLUTION* 108 (1990). WADSWORTH & MANN, *supra* note 31, at 284. Most workers on Arkwright spinning frames, introduced in 1769, were children. See FITTON & WADSWORTH, *supra* note 293, at 103-04. In 1780, one labor sympathizer complained that a child operating an Arkwright machine could perform the work formerly accomplished by eight or ten adults. *Id.* at 83.

301. See *Report . . . on the State of Children Employed in the Manufactories of the United Kingdom*, in BRITISH PARLIAMENTARY PAPERS, *INDUSTRIAL REVOLUTION, I CHILDREN'S EMPLOYMENT* 132, 135, 140 (Irish Univ. Press, photo. reprint 1968) (1816) (testimony of Sir Robert Peel) (hereinafter *Testimony of Sir Robert Peel*); J.L. HAMMOND & BARBARA HAMMOND, *THE TOWN LABOURER, 1760-1832*, at 144-46 (Augustus M. Kelley 1967) (1917). See generally Mary B. Rose, *Social Policy and Business: Parish Apprenticeship and the Early Factory System 1750-1834*, 31 BUS. HIST. 5 (1989).

early as 1758.³⁰² And in 1795 physician John Aikin, a friend of John Howard, lamented:

In these [cotton mills], children of very tender age are employed; many of them collected from the *workhouses* in *London* and *Westminster*, and transported in crowds, as apprentices to masters resident many hundred miles distant, where they serve unknown, unprotected, and forgotten by those to whose care nature or the laws had consigned them.³⁰³

The position of these children taken from their homes or orphanages and boarded by their employers was as precarious as their sponsor's business fortunes. If the concern folded, they would be set loose or traded with the machinery, as in this 1784 advertisement in *The Manchester Mercury*:

TO LETT, the Labour of 260 Children, With Rooms, and every other Convenience for carrying on the Cotton Business. For Particulars Enquire of Mr. *Richard Clough*, in Cannon-street, *Manchester*.³⁰⁴

The water-powered mills, in which so many children labored, "very early arrested the attention of Mr. Bayley," wrote his friend and biographer, Thomas Percival. Bayley was "adverse to the admission of Apprentices from a distance," a practice that left the apprentices "in some measure . . . unprotected." Percival said Bayley made "very forcible objections" to this "dissolution of family connections."³⁰⁵ Indeed, Bayley and his colleagues on the Salford bench took steps against the mistreatment of parish apprentices at the hands of their masters. In 1772 and again in 1780 the bench ordered overseers of the poor to make frequent visits to apprentices in their jurisdictions and to "enquire whether they are treated with Humanity by their several Masters and Mistresses, and are provided by them with proper and sufficient Cloaths, Meat and Lodging; and also duly taught and instructed in the several Trades and Occupations they are to learn."³⁰⁶ In some cases, not altogether rare, the bench released an apprentice from servitude to a cruel master.³⁰⁷

302. See WADSWORTH & MANN, *supra* note 31, at 349.

303. AIKIN, *supra* note 32, at 219.

304. MANCHESTER MERCURY, Aug. 3, 1784; see also MANCHESTER MERCURY, Aug. 31, 1790 ("To be LET, THE certain Labour of 240 Children from eight to fourteen Years of Age . . . For further Particulars enquire of Jonathan Blundell, Liverpool.").

305. PERCIVAL, *supra* note 69, at 5-6.

306. PRESCOTT'S MANCHESTER J., Nov. 14, 1772, quoted in WADSWORTH & MANN, *supra* note 31, at 407; MANCHESTER MERCURY, May 30, 1780.

307. See, e.g., MANCHESTER MERCURY, Jan. 25, 1785 (citing "full proof of Cruelty on the Part of her Master . . . and his Wife . . . by causing her to Work at unreasonable Hours, and beyond her strength, and by unmerciful beating"); MANCHESTER MERCURY, July 12, 1785; MANCHESTER MERCURY, Aug. 23, 1785; MANCHESTER MERCURY, Apr. 10, 1787; MANCHESTER MERCURY, Dec. 13, 1791. In 1795, when the bench established a regular schedule of sittings, it included among the regular types of hearings "Complaints of

Yet Bayley's resistance could hardly overcome the economic imperatives that made child labor prevalent. James Ogden explained in 1783 how children came to dominate the workforce of the water-powered spinning mills around Manchester:

[T]he awkward posture required to spin on [the new spinning machines] was discouraging to grown up people, while they saw with a degree of surprize, children, from nine to twelve years of age, manage them with dexterity, which brought plenty into families, that were overburthened with children, and delivered many a poor endeavouring weaver out of bondage to which they were exposed, by the insolence of spinners, and abatement of their work³⁰⁸

In Ogden's view, three facts led to a broad reliance on child laborers: The children fit the machines better, the children's families needed the extra income,³⁰⁹ and the children made for a more compliant workforce.³¹⁰ No doubt a fourth factor was the insatiable demand for labor generated by the monumental boom in cotton production that marked the 1780's:

Year	Lbs. of Cotton Wool
1731-40 (yearly avg.)	1,717,787
1741-50	2,137,294
1751-60	2,759,916
1761-70	3,681,904
1771-80	5,127,689
1787	approx. 22,000,000
1791	28,700,000
1801	56,000,000

TABLE 11. *Consumption of Raw Cotton Wool in Great Britain*³¹¹

Apprentices against Masters, for ill Usage." MANCHESTER MERCURY, Feb. 17, 1795

The magistrates had ample reason to fear for the safety of children bound apprentice to cruel masters. See WADSWORTH & MANN, *supra* note 31, at 407 n.3 (citing four instances of apprentices dying from ill treatment by their masters, all reported in *The Manchester Mercury* between 1769 and 1773); Lancashire Depositions (Apr. 2, 1790), P.R.O., P.L. 27/6 (recounting case of 16-year-old girl apprenticed to cloth cutter and allegedly killed by his regular beatings).

308. [OGDEN], *supra* note 293, at 86-87, 90.

309. Frederick Eden reported in 1797 that a child of seven or eight years could supplement the income of a Manchester family by 2s. per week; a child of nine or ten could garner twice as much. See 2 EDEN, *supra* note 63, at 357.

310. In the 1750's, Manchester's manufacturers resisted a combination of weavers by employing parish apprentices on a wide scale. See WADSWORTH & MANN, *supra* note 31, at 348-49.

311. *Id.* at 170; BOHSTEDT, *supra* note 33, at 70.

In 1784, midway through this boom, Bayley set his head against the economic locomotive fueled by child labor. That year a fever raged at the cotton works of Haworth, Peel, Yates & Tipping at Radcliffe, a milltown near Manchester. Bayley and his colleagues asked a group of physicians led by Thomas Percival to investigate its causes. The doctors blamed the fever on working conditions in the mills:

[W]e are decided in our Opinion—That the Disorder has been supported, diffused, and aggravated, by the ready Communication of Contagion to Numbers crowded together; . . . and by the Injury done to young Persons through Confinement, and too long continued Labour; to which several Evils the Cotton-Mill[s] have given Occasion.³¹²

Percival and his medical colleagues “earnestly recommend[ed]” a longer lunch recess and shorter working hours for all employees in the mills, but deemed “this Indulgence” to be essential for all workers under age fourteen.³¹³

At first the Salford bench took no action, but merely announced that “strict Attention” to the doctors’ “salutary Admonitions” is “earnestly recommended.”³¹⁴ Still, the proprietor of the mills, Robert Peel, felt moved to contest the doctors’ findings. He argued that the fever had in fact come from Preston (a prison town) and was as likely caused by the “damp unventilated bed Rooms” of the poor as by the cotton mills.³¹⁵ A unanimous bench responded with an extraordinary resolution, which appears to be the nation’s first governmental attempt to limit the working hours of children.³¹⁶

[I]t is the Opinion of this Court, That it is become highly expedient for the Magistrates of *this* County to *refus[e]* their Allowance to Indentures of *Parish* Apprentices, whereby they shall be bound to *Owners of Cotton Mills and other Works*, in which *Children* are obliged to work in the *Night*, or more than *ten* Hours in the Day.³¹⁷

According to Peter Walker, a local critic, Peel previously had stopped running his mills at night, but now restarted nighttime operations in defiance of the magistrates’ action.³¹⁸ Walker charged that Peel’s day-shift children worked

312. MANCHESTER MERCURY, Oct. 19, 1784.

313. *Id.*

314. *Id.*

315. MANCHESTER MERCURY, Oct. 26, 1784.

316. B.L. HUTCHINS & A. HARRISON, A HISTORY OF FACTORY LEGISLATION 9 (1966).

317. MANCHESTER MERCURY, Nov. 2, 1784; L.C.R.O., QSO/2, *supra* note 41, at 153 (Fall 1784).

318. MANCHESTER MERCURY, *supra* note 317. Peel continued to assert that the fever came from Preston, and he acknowledged that he still ran his mills at night. MANCHESTER MERCURY, Nov. 9, 1784.

thirteen hours and the night-shift children eleven, each with a half-hour meal break.³¹⁹ Yet there is no record of further action by the Salford bench.

Peel's defiance therefore went unpunished but not, it seems, unrepented. A generation later, having taken a seat in Parliament,³²⁰ he accomplished much of what the magistrates had hoped through the Health and Morals of Apprentices Act of 1802.³²¹ The act limited the labor of parish apprentices to twelve hours, daytime only, and required academic and religious instruction during the first four years of apprenticeship. Peel had consulted Bayley on the act,³²² and Bayley's friend Percival had helped to draft it.³²³ Percival's memoir of Bayley explains his friend's objection to the child labor practices of his day:

[W]hen a Parent has been induced to abandon his offspring, and the child is placed in a situation which extinguishes all the tender attachments of affinity, the strongest incentives to virtue are withdrawn, and the mind becomes prepared for idleness, malevolence, and profligacy.³²⁴

Bayley perceived the factory to be a seminary of vice,³²⁵ and a particularly pernicious one, because its students were predominantly youths who had no other source of moral guidance.³²⁶ As John Aikin complained in 1795, "the want of early religious instruction and example, and the numerous and

319. MANCHESTER MERCURY, Nov. 16, 1784. In testimony before Parliament in 1816 Peel admitted he often ran his machinery in two shifts for the whole 24 hours. Testimony of Sir Robert Peel, *supra* note 301, at 139.

320. The Robert Peel in question was the "first" Sir Robert Peel. See Testimony of Sir Robert Peel, *supra* note 301, at 138–39 (discussing correspondence in *Mercury*). There were three generations of Robert Peels. Robert Peel (1715 or 1716–1795) cofounded the firm of Haworth, Peel & Yates in 1764. His son, Sir Robert Peel (1750–1830), joined the firm in 1773 and matched wills with Bayley in the Radcliffe mills controversy. The second Sir Robert Peel (1788–1850) served as Prime Minister from 1834 to 1846. See 15 *DICTIONARY OF NATIONAL BIOGRAPHY* 654–69 (1968); *ANNALS OF MANCHESTER* 122 (W.E.A. Axon ed., London, John Heywood 1886).

321. 42 Geo. 3, ch. 73 (1802). At Parliament's 1816 hearings on child labor Peel confessed that during infrequent tours of his mills he was "struck" by the sad state of his child employees. Testimony of Sir Robert Peel, *supra* note 301, at 132.

322. See PERCIVAL, *supra* note 69, at 6.

323. Testimony of Sir Robert Peel, *supra* note 301, at 133.

324. PERCIVAL, *supra* note 69, at 6.

325. In 1800, a correspondent to the *Mercury* who supported a proposed act to prohibit the export of cotton yarn argued that

it is very far from being desirable to become merely spinners for the rest of Europe, as every thinking person must lament the depravity that may be traced to those seminaries of vice: the health of the rising generation is certainly very materially injured by the daily and frequent nocturnal confinement of children.

MANCHESTER MERCURY, June 3, 1800.

326. PERCIVAL, *supra* note 69, at 6. Ignatieff notes that Elizabeth Fry, the leading prison reformer of the post-Napoleonic Wars era, drew similar conclusions about the moral consequences of child factory labor when she toured the Midlands and North in 1819. IGNATIEFF, *supra* note 12, at 156. Ignatieff attributes this second reform era in part to concerns about the corruption of children. See *id.* at 156–57, 183–87. My argument is that such concerns emerged much earlier and were a major motivation behind the first reform era.

indiscriminate association[s] in these buildings, are very unfavourable to [the children's] future conduct in life."³²⁷

Bayley's early, well-documented hostility to the employment of children in textile mills suggests a more complicated relationship between factories and the first reformed prisons than some authors have embraced. Foucault, for example, asks whether it is "surprising that prisons resemble factories." He asks this rhetorically, as though it is obvious that prisons should have adopted the "regular chronologies, forced labour," and "authorities of surveillance" of the factory.³²⁸ Ignatieff makes the same point with similar rhetoric.³²⁹ Indeed, Ignatieff attributes the reformed prison's fall from favor in the 1790's to a growing disaffection with factories during the same decade. Of Thomas Percival he writes:

In the 1780's, like other members of the Manchester Literary and Philosophical Society, he had welcomed the new factories as benevolent instruments for the moral reform of the poor. By 1798, he had seen enough of the new industrialism to come to a different conclusion. In his reports on the moral and hygienic state of the Manchester population, he pointedly observed that factory masters overworked their parish apprentices and neglected their education.³³⁰

But the history of the Radcliffe mills controversy makes it irresistibly clear that Percival's (and Bayley's) mistrust of factories commenced even before the Salford magistrates resolved in 1785 to build a new prison. I have found no support for Ignatieff's suggestion that Percival had a change of heart toward factories that conveniently coincided with the rise and fall of enthusiasm for reformed prisons.³³¹ One cannot disagree with Foucault and Ignatieff that the

327. AIKIN, *supra* note 32, at 220. In correspondence with the author, Adam Hirsch has suggested that child labor might have been viewed as a positive thing—"instilling habits of industry . . . just as penitentiaries, and the workhouses before them, were supposed to do." Letter from Adam J. Hirsch to George Fisher (Nov. 21, 1994) (on file with author). Although contemporaries occasionally praised the economic aspects of child labor, *see, e.g., supra* note 308 and accompanying text, they claimed no good effect on behavior. To the contrary, the Manchester Board of Health complained in 1796 that child labor "too often gives encouragement to idleness, extravagance and profligacy in the parents, who, contrary to the order of nature, subsist by the oppression of their offspring." The children themselves "are generally debarred from all opportunities of education, and from moral or religious instruction." *See HUTCHINS & HARRISON, supra* note 316, at 9-10 (quoting Board's report and attributing authorship to Thomas Percival).

328. FOUCAULT, *supra* note 11, at 227-28.

329. IGNATIEFF, *supra* note 12, at 214-15 ("It was no accident that penitentiaries, asylums, workhouses, monitorial schools, night refuges, and reformatories looked alike, or that their charges marched to the same disciplinary cadence. . . . Nor was it accidental that these state institutions so closely resembled the factory.").

330. *Id.* at 114.

331. Ignatieff cites no source for his claim that Percival or any other member of the Literary and Philosophical Society (which included Bayley) initially welcomed factories. *Id.* at 114. The endnote following his reference to a "1798" report cites only Percival's *Observations on the State of Population in Manchester, id.*, but that work was published in 1774. An appendix to the work appears to have been published in 1789 (not 1798)—and indeed Ignatieff's endnote dates the work to 1789. *Id.* at 235. His reference to "1798" would appear to be a simple error, but one that renders his point meaningless because

manner of factory production left its stamp on the nature of prison discipline. But it is just as clear that if Bayley had believed that prison confinement would change inmates in the manner in which factory confinement changed children, the New Bayley would never have been built.

The walls-and-clocks argument analogizing the rise of the factory to that of the prison has a glib appeal, but it ignores how deeply troubled Bayley and many contemporaries were by the conditions of child labor.³³² I suggest we will arrive closer to the historical reality if we regard the new prisons not as an attempt to propagate the factory method of confinement, but as an attempt in part to remedy the factory's effects. Instead of analogizing prisons to factories, I suggest we analogize prisons to another institution—Sunday schools for working children. These arose almost contemporaneously with the new prisons and shared with them the common purpose of combating the worst effects of child labor.

The Sunday school movement began in 1784,³³³ the year of the Radcliffe mills controversy. Percival's report on the mills sounded the mission of the new schools by admonishing that "the rising Generation should not be debarred from all Opportunities of Instruction, at the only Season of Life, in which they can be properly improved."³³⁴ Salford Magistrate Richard Townley touched off the Sunday school movement when he published a letter from Robert Raikes in *The Manchester Mercury* of January 6, 1784.³³⁵ Raikes, an erstwhile Gloucester prison reformer,³³⁶ told Townley of the day in 1781 when the inspiration for the schools hit him:

in 1789 enthusiasm for the new reformed prisons was still vigorous. The New Bayley opened in 1790. In any event nothing Percival says about factories in his *Observations* is more unflattering than the 1784 Radcliffe report. It is true that the *Report of the Board of Health of Manchester*, presented in 1796, condemned the conditions of child factory employment. But this document, generally assumed to have been written by Percival, says little about factories that is different from the 1784 Radcliffe report. See HUTCHINS & HARRISON, *supra* note 316, at 9–11 (quoting 1796 report at length).

332. Jonas Hanway, for example, an early advocate of prison reform, also led a crusade against the monstrous abuse of boy chimney sweeps. See ABBOTT, *supra* note 292, at 87 & n.1; JONAS HANWAY, *THE STATE OF CHIMNEY-SWEEPERS YOUNG APPRENTICES* (n.p. 1773). Hanway's concern for child welfare took other forms. In 1756, together with Sir John Fielding, he helped found London's *Manne Society*, which recruited and outfitted boys (including delinquents) as servants to naval officers. See JUVENILE OFFENDERS, *supra* note 279, at 52–54 (summarizing JONAS HANWAY, *AN ACCOUNT OF THE MARINE SOCIETY* (1759)). He also urged passage of an act, generally known by his name, that aimed to improve the care of orphaned infants and that seems to have reduced mortality. See 7 Geo. 3, ch. 39 (1766); HAMMOND & HAMMOND, *supra* note 301, at 145. On Hanway's contributions to prison reform, see BEATTIE, *supra* note 15, at 569–71.

333. A few Sunday schools predated the "movement," with Manchester's first opening in 1782. See VIGIER, *supra* note 29, at 112.

334. *MANCHESTER MERCURY*, *supra* note 312.

335. A.P. Wadsworth says that the *Mercury* was the first to publish the letter. See A.P. Wadsworth, *The First Manchester Sunday Schools*, 33 BULL. JOHN RYLANDS LIBR. 299, 302 n.2 (1951). The letter's republication in *Gentleman's Magazine* is widely held to have sparked the nationwide Sunday school movement. See Robert Raikes, Letter, 54 GENTLEMAN'S MAG., pt. 1, 410–12 (1784). Thomas Laqueur suggests that Townley sent the letter to *Gentleman's Magazine*. See THOMAS W. LAQUEUR, *RELIGION AND RESPECTABILITY: SUNDAY SCHOOLS AND WORKING CLASS CULTURE, 1780–1850*, at 25 (1976).

336. See LAQUEUR, *supra* note 335, at 22. In *State of the Prisons*, Howard praised Raikes for his "unremitting attention to the prisoners." HOWARD, *PRISONS*, *supra* note 3, at 363.

Some business leading me one morning into the suburbs of [Gloucester], where the lowest of the people (who are principally employed in the pin-manufactory) chiefly reside, I was struck with concern at seeing a group of children, wretchedly ragged, at play in the street. I asked an inhabitant whether those children belonged to that part of the town, and lamented their misery and idleness.— Ah! Sir, said the woman to whom I was speaking, could you take a view of this part of the town on a Sunday, you would be shocked indeed; for then the street is filled with multitudes of these wretches, who, released on that day from employment, spend their time in noise and riot, playing at chuck, and cursing and swearing in a manner so horrid, as to convey to any serious mind an idea of hell³³⁷

The woman went on to express the lack of moral guidance of these young laborers in terms that no doubt resonated with Bayley and Percival: “[O]n the sabbath, they are all given up to follow their inclinations without restraint, as their parents, totally abandoned themselves, have no idea of instilling into the minds of their children principles, to which they themselves are entire strangers.”³³⁸ Townley asked “whether this is not a true Picture of Sunday Employment . . . throughout this populous Part of Lancashire.”³³⁹

Raikes’ words found an exceptionally receptive audience. Within nine months there were at least twenty-five Sunday schools in Manchester with a total enrollment of 1800 children.³⁴⁰ In two years Manchester’s enrollment passed 2800 and was the largest in the nation.³⁴¹ In October 1788 enrollment exceeded 5000 (out of a total school-age population of about 10,000³⁴²), and the town could boast of forty-four schools staffed by 117 teachers.³⁴³ Support for the schools was widespread and without regard to political or religious affiliation or class standing.³⁴⁴ Nationwide, the progress of Sunday schools was just slightly less startling. Barely six months had elapsed after publication of Raikes’ letter when Wesley exclaimed, “I find these schools springing up wherever I go.”³⁴⁵ In 1785 enthusiasts formed a national Sunday School Society. In 1788 nationwide enrollment may have approached 60,000.³⁴⁶ “One wonders,” A.P. Wadsworth has written, “whether any social reform movement had ever before spread with equal rapidity through England.”³⁴⁷

337. Raikes, *supra* note 335, at 410.

338. *Id.* at 410–11.

339. MANCHESTER MERCURY, Jan. 6, 1784.

340. See MANCHESTER MERCURY, Sept. 21, 1784.

341. See MANCHESTER MERCURY, May 30, 1786.

342. See VIGIER, *supra* note 29, at 112 n.57.

343. See MANCHESTER MERCURY, Oct. 14, 1788. In the whole of Salford Hundred about 10,600 children attended Sunday school. See MANCHESTER MERCURY, Aug. 19, 1788.

344. See LAQUEUR, *supra* note 335, at 27–33, 252–53. Manchester’s Sunday School Committee included both Church and Dissent. See Wadsworth, *supra* note 335, at 307–08.

345. See Wadsworth, *supra* note 335, at 304.

346. See LAQUEUR, *supra* note 335, at 44.

347. Wadsworth, *supra* note 335, at 302.

Like the new prisons, the new Sunday schools were not the product of national authority, but grew up as the result of decentralized local impulses.³⁴⁸

Sunday schools were conceived and popularized as a concomitant of child labor. Raikes and Townley focused on the depredations caused by child workers during their one day of idleness. Townley argued as well that employers owed their young workers an education:

Indeed, where the Owners are so much benefitted by the Labour of such young Creatures, many of them Children of the Public, *being taken from the Parish Workhouses*,—they seem *in Duty* bound, to take most especial Care, both of the Bodies and Minds of such young Folks, that when they grow too old, for that *particular* Branch of Employment, they may be well qualified to engage in others³⁴⁹

In 1785 the Bishop of Chester advised the Manchester Sunday School Committee that these schools “are more especially necessary in such populous manufacturing towns as Manchester, where the children are during the week days generally employed in work and on the Sunday are too apt to be idle, mischievous and vitious.”³⁵⁰ The publisher of the *Mercury* employed similar reasoning in urging cotton factory owners to establish Sunday schools for their child employees, “for none are greater Objects of Pity than those whose Station in Life obliges them to Labour *six* Days in a Week, and who want Parents or Guardians to take Care they attend at Church, or some other Place, where good Morals are taught the *seventh*.”³⁵¹

The children who attended Sunday schools received no other formal schooling, because their parents could not afford it³⁵² and because the work schedule would not permit it.³⁵³ The role of the schools was therefore far broader than that of today’s Sunday schools. Classes ran six hours,³⁵⁴ and the curriculum included not merely religion, but basic instruction in reading and (in some schools) writing. There were disputes about how much education it was wise to give to society’s “lower orders,”³⁵⁵ but there was broad

348. See LAQUEUR, *supra* note 335, at 33.

349. MANCHESTER MERCURY, Jan. 11, 1785.

350. Minutes of the Manchester Sunday School Committee, Aug. 11, 1785, *quoted in* Wadsworth, *supra* note 335, at 310.

351. MANCHESTER MERCURY, Apr. 11, 1786.

352. Manchester’s rules provided that “no Subscriber shall recommend any Children, whose Parents may be supposed capable or able to send them to any other School.” MANCHESTER MERCURY, Jan. 11, 1785.

353. “The greater part of the children educated in the Sunday schools are . . . employed in trades, manufactures, or husbandry-work: to this they give up six days in the week, and on the remaining one (the Lord’s day), they are instructed in the rudiments of Christian faith and practice.” BEILBY PORTEUS, A LETTER TO THE CLERGY OF THE DIOCESE OF CHESTER CONCERNING SUNDAY SCHOOLS 11 (1786), *quoted in* Wadsworth, *supra* note 335, at 310.

354. See MANCHESTER MERCURY, *supra* note 349.

355. Townley anticipated such resistance and offered this rebuttal together with his original submission of Raikes’ letter to the *Mercury*:

agreement that some education would improve the conduct and morals of the young and inure them to habits of industry and lawfulness. Perhaps the founders also hoped to mend families in which parents and working children had become strangers. In Manchester parents were required to promise that they would "second the Instructions of [the children's] Masters by hearing them repeat their Lessons, in the Week, with the Prayers in their Books for Morning and Evening."³⁵⁶

By these means the schools might help to prevent crime. In endorsing a plan for the new schools in 1784, the boroughreeve and constables of Manchester declared that the schools would "dispel Darkness, check the Progress of Vice, and save Youth from impending Destruction."³⁵⁷ In 1785, the secretary of the Manchester Sunday School Committee noted in a sermon entitled "The Advantages of Sunday Schools" that the laws "may punish crimes; but is it not a Christian's duty, if possible, to prevent them?"³⁵⁸ A correspondent to the *Mercury* predicted (in the publisher's words) that Sunday schools "would do more towards lessening the increase of Felons than all other Schemes that have ever been proposed."³⁵⁹ Even in 1790, six years after the movement began, faith in the power of Sunday schools to prevent crime was great enough for the publisher of the *Mercury* to follow a report of convicts being shipped off to Botany Bay with this offhand observation: "As there can be no possible prevention to such melancholy circumstances, but early instruction in virtue, who but must rejoice at the probable and happy effects that may arise from the institution of Sunday Schools?"³⁶⁰

Faith in the capacity of Sunday schools to lead children from crime was not peculiar to Manchester, but was part of the national mythology of the new

There are Persons who contend, that *all* Learning is not only unnecessary, but even prejudicial to the inferior Ranks of Mankind, as it makes them dissatisfied with that low and humble Situation in Life, which Providence has ordained to be their Lot; that it takes their Attention from, and makes them reluctantly undergo that daily Labour and Drudgery, which their Necessities require them to perform—but such Notions proceed from the most cruel and ungenerous Principles—are inculcated for the mean, dirty Purposes of Self-Interest and private Emolument, and are unworthy to be maintained or countenanced by any rational Being.

MANCHESTER MERCURY, Jan. 6, 1784. Townley pointed out that many great inventions came from working class persons who were graced with an education. *See id.*

It is difficult to judge what part of the support for Sunday schools grew from broad-minded hopes to improve the lot of the working poor and what part from the hope to improve their behavior. One important index might be the degree of support for the instruction of writing in addition to reading. Wadsworth says that after 1786 Manchester's schools taught reading only, but he suggests this restriction was a function more of Sabbatarianism than of classism. He notes that in 1794 the Sunday School Committee began to support the teaching of writing on Wednesday evenings. *See* Wadsworth, *supra* note 335, at 312–13. Bayley, according to Percival, supported instruction of writing in the schools. *See* PERCIVAL, *supra* note 69, at 6–7.

356. MANCHESTER MERCURY, *supra* note 349.

357. MANCHESTER MERCURY, Aug. 10, 1784.

358. JOHN BENNETT, THE ADVANTAGES OF SUNDAY SCHOOLS: A DISCOURSE 17 (Manchester, C. Wheeler 1785); *see also* MANCHESTER MERCURY, Sept. 28, 1784 (identifying Bennett as secretary of Sunday School Committee).

359. MANCHESTER MERCURY, June 29, 1784.

360. MANCHESTER MERCURY, Jan. 12, 1790.

schools.³⁶¹ It was surely no coincidence that Sunday schools and reformed prisons shared many common champions, including Howard, who praised Raikes' initiative in Gloucester;³⁶² Bayley, who served as a vice president of Manchester's Sunday school committee;³⁶³ and Hanway, who helped to found the Sunday School Society and authored a Sunday school text.³⁶⁴ The perceived source of the schools' power to prevent crime was the same as that of the new prisons: the malleability of young minds. As Townley wrote in 1785, "What Sculpture is to a Block of Marble, Education is, to the Human Soul."³⁶⁵ Supporters of the new schools believed that children who had been corrupted in society's seminaries of vice could now be reformed through a virtuous reeducation in Sunday schools—those "seminaries . . . for the promotion of the general good, and consequent security of society."³⁶⁶

Proponents used strong words for parents who kept children from school and hence left them vulnerable to society's corruptive influences. A 1785 correspondent to the *Mercury* expressed "Regret and Astonishment, that there are Parents so inconsiderate, or depraved, as to neglect or refuse to enforce the Attendance of their Children[.]" The writer continued: "When the Heart has never been duly impressed with a sense of moral and religious Duties, by what Means shall he silence his headstrong Passions? How shall he resist the insinuating Influence of wicked Companions? or withstand the various Temptations to which he will be exposed?"³⁶⁷ But the strongest words were reserved for cotton mill owners who barred their young workers from attending school on Sunday. In 1788 the boroughreeve, constables, and churchwardens of Manchester condemned the "impiety and unparalleled barbarity" and "sordid self-interest" of those masters who made their child laborers work Sundays and

361. See, e.g., HENRY ZOUCH, HINTS RESPECTING PUBLIC POLICE 23 (1786), quoted in BEATTIE, *supra* note 15, at 604 ("If these institutions should become established throughout the kingdom, there is good reason to hope, that they will produce an happy change in the general morals of the people, and thereby render the execution of criminal justice less frequently necessary."). The Salford bench appropriated Zouch's words in a 1786 resolution that announced broad-ranging measures against crime. See MANCHESTER MERCURY, Aug. 8, 1786; L.C.R.O., QSO/2, *supra* note 41, at 155 (Summer 1786)

362. See HOWARD, PRISONS, *supra* note 3, at 363 & n.†.

363. See MANCHESTER MERCURY, May 15, 1792.

364. See JONAS HANWAY, A COMPREHENSIVE SENTIMENTAL BOOK, FOR SCHOLARS LEARNING IN SUNDAY SCHOOLS (London, Dodsley 1786); JONAS HANWAY, A COMPREHENSIVE VIEW OF SUNDAY SCHOOLS (London, Dodsley 1786); LAQUEUR, *supra* note 335, at 126, 229.

365. MANCHESTER MERCURY, Feb. 1, 1785. Townley attributed the metaphor to "Mr. Addison," who was also quoted by Bayley and Clowes in their 1783 report on the Manchester House of Correction. See *supra* note 224. Both quotes suggest Addison had a materialist streak. Compare John Locke, who considered a child's mind to be a "yet empty cabinet" waiting to be furnished or "white paper, void of all characters." JOHN LOCKE, *An Essay Concerning Human Understanding*, in 1 WORKS 1, 20, 77 (London, C. & J. Rivington, 12th ed. 1824). One might argue in support of Ignatieff's ideological theory of the reform that Addison and other popular writers transmitted the ideology of Locke and Hartley to the reformers. I think it is more likely that Addison and his ilk generated colorful quotes that happened to prove useful to practical persons, like Bayley and Townley, when defending policy initiatives they based primarily on observations of the community around them.

366. MANCHESTER MERCURY, Nov. 2, 1790 (words of *Mercury's* publisher).

367. MANCHESTER MERCURY, Apr. 12, 1785.

hence left them "untaught and unprincipled, and . . . miserable prey to ignorance, profligacy and disorder."³⁶⁸

In the venom of these words modern readers may spy a discomfiting naiveté. One wonders if the boroughreeve, constables, and churchwardens were in earnest when they predicted that regular attendance at Sunday schools would "build again the fair temple of religion, and . . . save a guilty nation, by instilling into the minds of our youth principles of solid wisdom, virtue, and the fear of God."³⁶⁹ The Sunday school movement shared with the prison reform movement a certain childlike optimism. The similarities between these movements in their rhetoric, timing, and goals were no coincidence. Both responded to the perceived threats of industrialization, urbanization, family disruption, and vice. Both staked their hopes on the capacity of social institutions to rescue the community's youth from the corruptive influences of modern industrial society and to reeducate them in piety and lawfulness.

I argued earlier that the prison reformers subscribed to two theories of criminality—the slippery slope of crime and the seminary of vice—and that both theories supported a belief that *young* criminals were most susceptible to reform. I suggest that the history of Manchester's and Britain's Sunday school movement helps to prove two principles about the nationwide prison reform movement: first, that the reform was motivated by a faith in the reformability of *young* criminals in particular; and second, that the reform responded to a perceived crisis in the moral upbringing of the nation's youth, a crisis caused largely by the sudden massive employment of children in the booming industrialization of the last quarter of the eighteenth century. Bayley and his partners in the reform never spelled out these principles as clearly as I have just stated them—a fact to be addressed in Part VI. Yet Bayley provided a remarkably lucid statement of his philosophy of the reform, one that leaves no doubt that he held the Sunday school and the reforming prison to share a common method and purpose. I will quote at length a charge Bayley delivered to the grand jury of the Salford Quarter Sessions in 1785, one year after the beginning of the Sunday school movement and the year in which local prison building in England began in earnest:³⁷⁰

GENTLEMEN,

[Bayley begins the charge by noting the importance of guarding against "Vice, Profaneness and Immorality." Next he considers why crime victims so often fail to seek prosecution. He complains that the

368. MANCHESTER MERCURY, Apr. 1, 1788.

369. *Id.* Even sober men such as Adam Smith and John Wesley indulged in unguarded praise of the new schools. Smith told Raikes: "No plan has promised to effect a change of manners with equal ease and simplicity since the days of the Apostles." Wadsworth, *supra* note 335, at 305. Wesley said, "I verily think these schools are one of the noblest specimens of charity which have been set on foot in England since the time of William the Conqueror." *Id.*

370. See EVANS, *supra* note 6, at 135.

"Tenderness" of some victims prevents them from "lending their required Assistance in the execution of those Laws which have provided adequate Punishments for *smaller* Offences. Thus Impunity becomes the great source of Crimes." He then proceeds to the topic of punishment:]

If the ends of Punishment be justice, and not revenge—Reformation, and not Destruction—it will be at once a Proof of our Wisdom and Humanity, to detect, and punish *with Severity*, early Transgressions, and what are very improperly disregarded as comparatively of little Importance. On this ground, Sir William Blackstone says, "Preventive Justice is on every principle of Reason, of Humanity, and of sound Policy, preferable in all respects to punishing Justice."^[371]

And here it may be proper for me to inform you, that from the fullest Conviction of the Truth and Importance of the above Principle, the Magistrates of this Hundred, have unanimously resolved to provide a new House of Correction and Penitentiary House, with all those Arrangements which are *positively required* and *commanded* by several late Acts of Parliament.

"As Confinement to *punish*, ought also to be a Confinement to *reform*;"^[372] in this Gaol the several Descriptions and *sexes* of the Prisoners will be *separated* from each other in *different* Courts. *Each* Prisoner will be Lodged in a *distinct* Cell; and such Regulations will be made as may prevent Pestilence, secure Health, enforce Labour, provide Instruction and produce Reformation. The necessary Expences which will attend the Completion of this good work of mercy and justice, will, I am confident, be cheerfully borne by an enlightened and generous Public, when they are rationally led to expect (in the Words of that excellent Act of Parliament, the 19th of Geo. 3d C. 74. Sect. 4th) "That *solitary* Imprisonment, well regulated Labour, and religious Instruction, may be Means, under Providence, of deterring others from the Commission of Crimes, of reforming Individuals, and inuring them to Habits of Industry."

Gentlemen—If it be far better to prevent than to punish Crimes, how greatly ought we to Esteem and Support those numerous and truly charitable Institutions of *Sunday Schools* lately set up in various Parts of this County, "for the Education of such Children, whose Parents are so Poor that they cannot, or so wicked that they will not send them to School on the *Week Days*." Mr. Howard informs us that there are few Crimes committed in *Scotland* and in *Switzerland*, because great Care is taken in those Countries to give Children, even the poorest, a Religious Education. The great neglect of this amongst us, is *one great* Reason that our Land is filled with Villains, our Persons and Property are Insecure, and our Gaols are crowded with Felons.

Our horror is almost continually excited by the dreadful accounts of multitudes of poor creatures who are hanged almost in *childhood*

371. 4 WILLIAM BLACKSTONE, COMMENTARIES *251 (citing Beccana).

372. This is a slight misquote of Paul. See PAUL, *supra* note 7, at 10.

for the blackest crimes. At the fatal Tree they all tell us—that they have never been taught to know God and their duty; have never been corrected for their early wickedness,—but been abandoned by their Parents, and suffered at once to plunge headlong into vice and destruction.—How do these wretches punish us, by their villainies, for their neglected education?

Now, by these *Sunday Schools*, great numbers of poor Children are kept from profaning the Sabbath, are taken to Church, and are taught to behave themselves with decency, and to be clean in their persons. They learn to read and pray, and are instructed, from the Catechism, in the great principles of the Christian Religion.

These are great means of preventing crimes; and, as I hope the Sunday Schools may produce the happiest effects, and advantages beyond the reach of calculation, this must be my apology for mentioning them on *this* occasion, and expressing my hearty wishes for their enlargement and success.³⁷³

VI. THE JUVENILIZATION OF PUNISHMENT

If youth were to be the object of the new prisons, then why did the reformers not say so explicitly and limit their new reforming prisons to the crimes of *youth*? To modern minds accustomed to the line dividing “adult” and “juvenile,” formalizing that distinction would seem an obvious step toward addressing a perceived problem of youthful delinquency. The late eighteenth-century reformers never took this step. Although they did to some degree differentiate punishment according to the age of the offender, their strategy was not so much to separate out youthful offenders for special treatment, but to adapt the entire regimen of their new prisons to the special task of reforming the young. That is, they “juvenilized” the punishment of petty offenses. In this Part, I will seek to explain why the reformers passed over the seemingly obvious strategy of a formal separation of adult from juvenile in favor of the strategy of juvenilization. In Part VII, I will trace the legacy of late eighteenth-century juvenilization to the juvenile justice movement of the nineteenth century.

The New Bayley admitted some, perhaps many, older prisoners.³⁷⁴ We cannot know how many. Prisoners’ ages were not recorded regularly before 1821 and were not even intermittently recorded in our period.³⁷⁵ It appears

373. MANCHESTER MERCURY, Aug. 9, 1785.

374. In 1791, a year after the New Bayley opened, its chaplain forswore any hope of instructing older prisoners in the institution’s Sunday school: “The Directors of your Prison, reflecting upon the age of the greater part of you, and upon the untractable disposition of many, formed no such vain expectations.” W.C. [WILLIAM COWHERD], *THE PRISONER’S SELECT MANUAL OF DEVOUT EXERCISES* 33 n.* (Manchester, G. Swindells 1791).

375. I am grateful to the Lancashire Record Office Research Service for helping me to confirm this negative.

Very occasional news accounts of defendants’ ages confirm at the least that some young persons were punished for what were perceived to be serious crimes. The *Mercury* noted in 1792 that among those

that no court in Britain kept regular records of defendants' ages throughout the late eighteenth century. The sheer absence of such age data suggests one reason for the failure of the reformers to punish explicitly according to age: Enforcing age-based rules would have exceeded the capacity of the eighteenth-century provincial bureaucracy. Today it seems strange that court clerks did not deem defendants' ages worthy of record. All considerations of reformability aside, a defendant's age would be useful in distinguishing two persons of the same name for the purpose, among others, of showing that the defendant was a repeat offender. I have seen no evidence that anyone in Manchester kept records of prior convictions more sophisticated than the chronological listings of the order books or the memory of officials present in the court.³⁷⁶ Moreover, the authorities probably had no way to confirm a defendant's age short of checking baptismal records in the defendant's native parish. Peter King has reported that in the rare case when defendants were asked their age, younger defendants avoided giving their age as twenty-one (they apparently expected leniency for their youth),³⁷⁷ and older defendants rounded off their ages.³⁷⁸

A second possible explanation for the reformers' failure to set a specific age limit on those sent to the new prisons is that they had no power to do so. As the juvenile justice reformers of the early nineteenth century would discover, it was not clear that even Parliament—much less local magistrates—had the power to create formal age-based distinctions in the justice system's treatment of criminal defendants. It had long been established at common law that a child under seven could not be guilty of a felony, while a child of fourteen would be treated as an adult. Between those ages a child could be convicted (and executed) if the court and jury found that the child could distinguish good and evil.³⁷⁹ The earliest proposals to elaborate upon these rigid common law demarcations and to create a system of summary adjudication of juvenile offenses met with strong constitutional objections.³⁸⁰ Moreover, there was no consensus in the nineteenth century—much less in the late eighteenth—about where to draw the line between juveniles and adults. In 1827 one of the most prominent juvenile reformers advocated specialized

sentenced to seven years' transportation at the most recent quarter sessions were Samuel Newal, age 15, for theft of a shawl; Jonas Eastwood, age 14, for theft of handkerchiefs; and Joseph Hall, age 14, for theft of money. See MANCHESTER MERCURY, May 1, 1792; see also the account of George and Elizabeth Youngson, *infra* note 389.

376. In a rare reference to recidivism, the *Mercury* reported in 1792 that a 14-year-old boy had been sentenced at the Salford Quarter Sessions to seven years' transportation. He had "been so often tned, that the Deputy Constable could not enumerate them." MANCHESTER MERCURY, May 1, 1792.

377. See BEATTIE, *supra* note 15, at 244 & n.81.

378. See Peter King, *Decision Makers and Decision-Making in the English Criminal Law, 1750-1800*, 27 HIST. J. 25, 35 (1984).

379. See 4 WILLIAM BLACKSTONE, COMMENTARIES *22-*24.

380. See, e.g., T. COKER ADAMS, A LETTER ADDRESSED TO SIR EARDLEY-EARDLEY WILMOT 14-22 (London, Longman, Rees, Orme, Brown, and Green 1828).

treatment of offenders under twenty-one; a year later he dropped his proposed cutoff to age eighteen.³⁸¹ When Parliament finally formalized a summary adjudication system for juvenile offenses in 1847, it drew the line at age fifteen. Three years later it raised the age to seventeen.³⁸²

A third, more substantial obstacle must have deterred the reformers from barring older prisoners from their new institutions: There was simply no reliable alternative. I argued in Part III that the interruption of transportation cannot explain the form the new prisons took or even, on its own, the rash of prison construction beginning in the mid-1770's. Still, there is no question that the crisis in transportation meant that more convicts had to be imprisoned. Institutional pressures to accommodate adult convicts would have required occasional, perhaps even frequent, exceptions to any general rule setting prisons aside for the young.

Despite these obstacles to a formal age-based distinction, there is evidence that the reformers informally differentiated punishment according to age. They sent the young more often to prison and also tried to separate them from the adult population while there. Evidence that the young were more often imprisoned comes from the five counties of the home circuit,³⁸³ where between 1782 and 1787 the clerk recorded the age of every defendant to appear at the assizes. Peter King's analysis of these rare data³⁸⁴ offers strong (if not overwhelming) support for the proposition that reforming punishments were primarily meted out to the young. King found that teenagers convicted of property crimes were far more likely to be imprisoned and far less likely to be hanged than were thieves in their twenties.³⁸⁵ When King limited his sample to cases of grand larceny, for which execution was generally not an option, he found that the youngest convicts were somewhat more likely to be imprisoned and somewhat less likely to be transported than were those in their mid-twenties.³⁸⁶ King attributes the greater tendency to imprison young defendants in part to "notions about the reformability of the young and to the theory that, once removed from their abandoned connexions, youthful offenders

381. Compare EARDLEY EARDLEY WILMOT, A LETTER TO THE MAGISTRATES OF ENGLAND 26 (London, John Hatchard and Son 1827) [hereinafter EARDLEY WILMOT, LETTER OF 1827] (proposing 21 years) with EARDLEY EARDLEY WILMOT, A LETTER TO THE MAGISTRATES OF ENGLAND 31 (London, John Hatchard and Son, 2d ed. 1828) [hereinafter EARDLEY WILMOT, LETTER OF 1828] (proposing 18 years).

382. Compare 10 & 11 Vict., ch. 82 (1847) (persons not exceeding 14 subject to summary adjudication) with 13 & 14 Vict., ch. 37 (1850) (persons not exceeding 16 subject to summary adjudication).

383. Kent, Surrey, Sussex, Hertford, and Essex.

384. See King, *supra* note 378, at 34–42. King notes that between 1776 and 1782 some ages are recorded. He suggests that the practice was related to the interruption of transportation, but does not elaborate on the connection. See *id.* at 34 n.27.

385. About 45% of the youngest group of defendants (age 13 to 15) were imprisoned versus only about 22% of those age 25 to 27. About 33% of the youngest group and about 57% of those age 25 to 27 were sentenced to hang. See *id.* at 35–37 (especially fig. 1).

386. About 68% of the youngest defendants and about 55% of those in their mid-20's were imprisoned. About 25% of the former group and 36% of the latter group were transported. See *id.* at 38–39 (especially fig. 3).

might change their ways.”³⁸⁷ King also discovered, however, that the treatment of defendants over age thirty largely approximated the treatment of the youngest convicts—that is, that convicts in their twenties were treated more harshly than both groups.³⁸⁸ He was able nonetheless to confirm a particular favoritism toward young criminals by looking to trial judges’ recommendations for royal pardons, which reflected considerable solicitude toward youth and no comparable sympathy toward middle age.³⁸⁹

387. *Id.* at 41; see also BEATTIE, *supra* note 15, at 243 (suggesting that clerks recorded ages during this five-year period to aid assize judges in determining which criminals should be imprisoned and which sent to hulks); EKIRCH, *supra* note 186, at 39–40 (arguing that young convicts were more likely to be spared gallows and instead transported because judges perceived young to be reformable).

While I am grateful for these interpretations, which largely support the propositions I have put forward here, King’s data strike me as less than conclusive. Given their source, however, what is surprising is that they offer as much support as they do. After all, King’s sample is limited to assize courts. See King, *supra* note 378, at 34 n.27. Although assize juries likely shared popular notions about the reformability of the young, there is little evidence that assize judges were engaged in the kind of reforming missions undertaken by local magistrates such as Bayley and Paul. As I argued in Part I, Bayley’s reforming method contrived to keep jurisdiction over as many cases as possible in the Salford Quarter Sessions, where he had the necessary influence to work his reforms. Moreover, as I argued in Part IV, faith in the ability to reform criminals depended in part on early intervention—on punishing the young criminal’s first, most petty offense. Assize judges rarely had this opportunity, because only the more serious crimes were tried before them.

388. See King, *supra* note 378, at 35–40. King speculates that convicts over 30 may have received more lenient treatment than those in their 20’s, because those over 30 were more likely to be married with children. *Id.* at 41.

389. See *id.* at 45. King also studied the age profile of the criminal population. About 19% of the accused in his sample were under 20, and the peak of the age curve was between 19 and 22. See *id.* at 35–36. These figures offer only mild support for my hypothesis that the problem of crime by youths had assumed proportions dramatic enough to capture the attention of reformers. But King’s limited data base—defendants at assizes between 1782 and 1787—distorts the age data in several respects.

First, we may presume that young criminals were the least likely to commit the kinds of serious offenses prosecuted at the assizes. See BEATTIE, *supra* note 15, at 244. There were of course exceptions. The depositions for the Lancashire assizes reveal that George Youngson, age 12, and his sister Elizabeth, age 13, were indicted in 1786 for the theft of 47s. from the cash drawer of a Lancaster warehouse. See P.R.O., P.L. 27/6. They were tried, found guilty and sentenced to hang. They were then (predictably, one hopes) pardoned and transported to New South Wales for seven years. See Assizes of Mar 26, 1787, P.R.O., P.L. 28/3.

Second, a prominent concern of the reformers was that crime victims would not prosecute the young out of the tender-hearted belief that the laws were too severe. See *supra* notes 241–52 and accompanying text. Bayley and other magistrates tried to establish in the courts of quarter sessions a milder tariff of penalties to encourage crime victims to bring young criminals before the bar. No similar effort was made by assize judges.

Third, 1782 to 1787 were peacetime years in which returning soldiers swelled the percentage of defendants in their mid-20’s, thereby decreasing the percentage of all other age groups. But see BEATTIE, *supra* note 15, at 246 n.84, 247 (citing age data from Surrey assizes during wartime years of 1799–1800, which show that proportion of defendants in 18-to-25 age group shrank, as expected, but also that percentage of younger defendants remained quite small).

Fourth, even absent these distortions, King’s data span too few years to allow us to judge whether the proportion of young defendants was growing over time.

In any event, we may well question whether reality, as reflected by King’s data, is the important thing. Hanway was probably wrong in his perception that “[m]uch the greater part of those who go to the gallows, are boys.” HANWAY, *supra* note 235, at 31 (defining boys as those from age 16 to 21); see also 1 RADZINOWICZ, *supra* note 17, at 14 (citing likely exaggerated statement of Solicitor General Sir Archibald Macdonald to House of Commons in 1785 that 90% of all those executed in London were under 21). But such perceptions may go further to explain the reformers’ motives than statistics generated centuries later.

Once in a reformed prison, young convicts were generally kept separate from their older counterparts. Isolating the various classes of prisoners was one of the defining characteristics of the new Howardian prison. The new prisons segregated inmates not only by sex and by their status as pre- or post-trial, but also by the seriousness of their offense.³⁹⁰ The reformers intended such separation to prevent the more serious offenders from corrupting the less serious. That rationale suggests an understanding that one class was more susceptible to reform than the other. Robin Evans has found evidence that within the new prisons solitary confinement was more frequently imposed on petty offenders than on felons—"on the meekest, not the boldest." Evans attributes this difference in treatment to the reformers' understanding that petty offenders "were much better material for reformation."³⁹¹

Beyond marking off such distinctions within institutions, the reformers sought to maintain functional distinctions *between* institutions. Howard explicitly distinguished houses of correction, intended for less serious offenders, from the proposed national penitentiary houses. The penitentiary houses, he said, should substitute in part for capital punishment. They should take in "old, hardened offenders . . . for a long term, or for life."³⁹² In Lancashire, Bayley presided over the construction of the New Bayley Prison and was largely responsible for a second new house of correction in Preston, the seat of another of the county's hundreds. But the county retained its old jail in the Castle of Lancaster, which, although improved at Bayley's initiative, never took on the shape of a Howardian prison. Assize judges occasionally sentenced persons convicted of simple theft to do their time in one of the county's houses of correction, but they generally sent the more serious felons to the Castle. Assize judges never sent persons convicted of manslaughter to one of the houses of correction. Conversely, although the justices at the Salford Quarter Sessions would occasionally sentence assailants, and especially sexual assailants, to serve their time at the Castle, the justices almost always sent petty larcenists to the Manchester House of Correction or (beginning in 1790) the New Bayley. Petty larceny was, as I discussed in Part I, a particular focus of Bayley's reforming energies. It was a crime often cited when reformers spoke of the need to formulate a mild punishment for a young miscreant's earliest offense.

In Gloucester, Paul embraced this "distinct use of the several species of prisons."³⁹³ Paul had the luxury of constructing several new prisons that

390. See *supra* note 134 and accompanying text.

391. EVANS, *supra* note 6, at 189.

392. HOWARD, LAZARETTOS, *supra* note 3, at 221. Several reformers thought that even condemned convicts should serve the time awaiting execution in solitary confinement so that they might reflect and repent before dying. See, e.g., [DENNE], *supra* note 23, at 36.

393. Testimony of Sir G.O. Paul, *supra* note 252, at 401.

would take three forms.³⁹⁴ The jail would serve only as a detention place for those awaiting trial or execution. The penitentiary (physically part of the jail) would serve as substitute punishment for convicts originally sentenced to death or transportation. But the penitentiary, on which historians have tended to focus disproportionately, provided only thirty-two cells for men and twelve for women for all of Gloucestershire.³⁹⁵ It hardly constituted a revolution in the punishment of crime. Rather, the county's five new houses of correction formed the core of Paul's efforts to reform prisoners by "check[ing] the early dawnings of vice, and disobedience to legal ordinance;—by wholesome restraint, and by privations, acting on the mind, to punish and discourage incipient offenders."³⁹⁶ Paul, like Bayley, did not believe the new prisons had the potential to reform *all* prisoners, but only early offenders. Hence, as Ignatieff reports, over seventy percent of all committals to Paul's new prisons were for misdemeanors or summary offenses.³⁹⁷

There is therefore substantial evidence that Bayley, Paul, and their counterparts in other jurisdictions³⁹⁸ intended their reforming institutions to be for the most "reformable" criminals. As a proxy for reformability they did not rely on age so much as on the maturity of the convict's criminal habits. Yet it is surely too much to claim that the reformers made consistent distinctions in their treatment of convicts based on either age or boldness. There simply is no evidence that the reformers separated those before the bar into such cleanly delineated categories. From the absence of a clear line, Margaret May has argued that before "juveniles" emerged as an explicit category in the mid-nineteenth century, Britain's penal system "made little specialised provision for children."³⁹⁹ On the contrary, the system of confinement for minor offenses devised by Bayley and other reformers made little specialized provision for mature criminals. The late eighteenth-century reformers "juvenilized" criminal punishment in Britain. Not merely did they make specialized provision for children, they fitted their new prison regimen

394. See PAUL, *supra* note 246, at 9–13.

395. See I McCONVILLE, *supra* note 5, at 101.

396. Testimony of Sir G.O. Paul, *supra* note 252, at 401; see EVANS, *supra* note 6, at 139–41.

397. See IGNATIEFF, *supra* note 12, at 108. Adam Hirsch has noted that early American prison builders also focused on minor crimes. See HIRSCH, *supra* note 188, at 27.

398. Ignatieff has determined that most persons imprisoned in London's Old Bailey after 1775 were first-time offenders convicted of minor larcenies, while "atrocious and Hardened" offenders were sent to the hulks. See IGNATIEFF, *supra* note 12, at 81–82. The most serious criminals, he notes, were still punished by transportation and death. *Id.* at 92–93. In parliamentary debates of 1790–91, Middlesex Magistrate William Mainwaring objected to a proposal that convicts awaiting transportation be held in corrective prisons. There is limited prison space, he said, and transportees are relatively unlikely to be reformed. See DEBRETT'S PARLIAMENTARY DEBATES 326 (1790–91). (I thank Joanna Innes for this reference.) A Yorkshire magistrate wrote in 1793 that houses of correction (as opposed to county jails) are "destined for the reception of those who are accused, or convicted of small offences." ALEXANDER WEDDERBURN, OBSERVATIONS ON THE STATE OF THE ENGLISH PRISONS AND THE MEANS OF IMPROVING THEM 10 (London, John Stockdale 1793).

399. Margaret May, *Innocence and Experience: The Evolution of the Concept of Juvenile Delinquency in the Mid-Nineteenth Century*, 17 VICTORIAN STUD. 7, 8 (1973).

to the special needs of young offenders, but then applied that regimen to a broad group of minor offenders that were not all young.⁴⁰⁰

The juvenilization of punishment was in some ways the natural consequence of the underlying philosophy of the late eighteenth-century reform. The reformers believed that young criminals were taught criminal habits in one of society's schools of vice. Because the system failed to punish the offender's early, minor crimes, the delinquent fell into more serious trouble. The process was passive. As many historians have concluded, the reformers did not regard criminals to be intrinsically evil.⁴⁰¹ I have argued that the reformers arrived at this conception of the etiology of criminality because they saw the evidence all around them. In his community Bayley saw children who had been separated from their parents and all moral authority, set to work twelve hours in a day, six days in seven, and then permitted to roam licentiously on the seventh. The plan of Bayley's reform was to bring these young persons within the criminal justice system when they first broke the law and to reform them while they were still reformable, before they hardened into criminals. Under the reformers' theory of criminality, however, even those caught too late and permitted to harden were not intrinsically evil. They were simply twice victimized: once by the society that led them astray, and once by a criminal justice system that failed to correct them in time. As the author of one 1789 tract asked, "If they be suffered to remain where the contagion is, is it *their fault* that they take the disease?"⁴⁰² It was as true in Britain in the late eighteenth century as it is in America today that when young criminals are perceived to be the victims of urban moral degeneration and the collapse of the family structure, some observers will regard adult criminals to be the grown-up victims of those same forces.⁴⁰³ In the minds of the reformers it would have been barbarous to punish adult criminals for the system's negligence. The system owed them an attempt, however futile, at reform.

Moreover, the reformers may have regarded the problem of adult criminals to be temporary. They saw little need to make specialized provision for older offenders, perhaps because they foresaw a time in which there would be few

400. Rothman makes a similar point in his study of Jacksonian conceptions of crime: "They stripped the years away from adults, and turned everyone into a child." ROTHMAN, *supra* note 232, at 76.

401. See, e.g., EVANS, *supra* note 6, at 393-94; IGNATIEFF, *supra* note 12, at 66-67.

402. PHILANTHROPIC SOCIETY (Second Report), *supra* note 263, at 25; see also HANWAY, DISTRIBUTIVE JUSTICE, *supra* note 268, at xiii ("The prayer we address to the great Parent of mankind is, that we may not be led, or *fall* into the ways of temptation; implying, that we ought to *deliver* others *from* it, not expose them *to* it, by *evil communication*."); PAUL, *supra* note 7, at 49 ("[I]f it be by Correction of the smaller Crimes that the greater are prevented, when we dispense with the smaller, we become responsible for the greater that ensue.").

403. See, e.g., Molly Ivins, *Crime and Punishment*, S.F. CHRON., July 19, 1993, at A21:

I don't believe there is such a thing as a bad baby. I do think a baby born to a 13-year-old drug-addicted mother and an absent father, raised hungry in a violent environment, subjected to physical and sexual abuse, sent to a school where he doesn't learn anything, whose only successful role models are drug dealers, is quite apt to join a teen gang and wind up graduating to serious crime. And in a very real sense, it ain't his fault.

such offenders. One must bear in mind the reformers' unguarded optimism in the capacity of their new institutions to halt the progress of criminality within an individual. "Few men have been hanged for a Felony," Paul wrote, "that might not have been saved to the Community by Correction of a former Misdemeanour."⁴⁰⁴ By correcting misdemeanants, the reformers thought they would prevent the maturation of felons. Perhaps the reformers did not believe that the current generation of felons could be corrected—perhaps they held "no such vain expectations."⁴⁰⁵ They might yet have believed that they could stave off the development of a new generation of felons, so that a generation hence there would be few felons left to punish. "The present adult race of infamy might *when young*, have been formed to another character," lamented one observer in 1789, "and the necessity have been prevented of the punishments and the miseries they suffer!"⁴⁰⁶ In time, the only substantial class of criminals would be those young offenders whom the system had not yet had the chance to "form to another character." That is, the reformers may have envisioned a juvenilization of the criminal justice system itself—a progression to a time when the great majority of defendants would be young. In such a system there would be little need for separate institutions to confine older and hardened offenders. There would be few such criminals, and they could be punished in the old manner—by transportation or by hanging.

The reformers therefore juvenilized criminal punishment in Britain. They adapted the greater part of the penal machinery to the specific characteristics of one target population: young or petty offenders. For something short of a generation, the development of criminal punishment in Britain primarily responded to two perceived needs. The first was to bring young offenders, whose punishment had generally been imposed outside the criminal justice system if at all, within the system. The second was to build and maintain prisons that would give these young offenders a corrective reeducation. If older offenders were also sent to the new reforming prisons, it was not because the reformers thought imprisonment to be the appropriate punishment for them, but because the reformers had decided to tolerate their presence within a system designed to correct the young.

Allow me now to return to the questions I set out at the beginning of this Article—four questions that any good retelling of the late eighteenth-century prison reform movement ought to help answer. The first was why the reformers rejected a deterrent mode of punishment in favor of a corrective mode. If I am right in arguing that the prison reformers of the last quarter of the eighteenth century were particularly troubled by the crimes of youth, then there is no mystery why they should have embraced a corrective penology.

404. PAUL, *supra* note 7, at 49–50.

405. See *supra* note 374 (quoting William Cowherd).

406. PHILANTHROPIC SOCIETY (Second Report), *supra* note 263, at 25.

Whether the metaphor be a block of marble, an empty cabinet, or a sheet of blank paper,⁴⁰⁷ the notion that children were particularly receptive to external impulses was as familiar then as it was before⁴⁰⁸ and is now.⁴⁰⁹ When Thomas Percival asserted that children must receive instruction in "the only Season of Life, in which they can be properly improved,"⁴¹⁰ and when the Philanthropic Society spoke of "[c]hildren [who] are of an Age capable of being reclaimed,"⁴¹¹ neither felt the need to elaborate on the proposition that the *young*—and indeed only the young—may be reformed. As Jonas Hanway said simply, "The probability of reformation must be in favour of the youth"⁴¹² We may assume the point was commonly understood.

The answer to my second question—how proposals to move toward a corrective penal regime gained such ready, broad acceptance—follows from the same reasoning. Few could not be moved by the thought of youngsters laboring through the night or by the sight of them being hauled before the bar. The universal power of these images helped to catalyze the prison reform movement, as it did the Sunday school movement.

407. See *supra* note 365 and accompanying text.

408. See, e.g., THOMAS FIRMIN, SOME PROPOSALS FOR THE EMPLOYMENT OF THE POOR 1–4, 37 (London, 2d ed. 1681), reprinted in JUVENILE OFFENDERS, *supra* note 279, at 20 (noting virtues that would follow "if due Care were taken to instruct young Children, and to put them into a good Course of Life, before Evil had taken hold of them"); Bernard William McLane, *Juror Attitudes Toward Local Disorder: The Evidence of the 1328 Lincolnshire Trailbaston Proceedings*, in TWELVE GOOD MEN AND TRUE 36, 36 (J.S. Cockburn & Thomas A. Green eds., 1988) (quoting Thomas Brinton, late 14th-century bishop of Rochester, complaining of those who would defend thief by saying, "He is young: if a youth has gone wrong, the old man will be able to amend.").

409. See, e.g., John W. Mashek, *Reno Links Criminality to Lack of Early Childhood Training*, BOSTON GLOBE, July 13, 1993, at 3 (citing opinion of U.S. Attorney General that child must learn by age three the consequences of behavior and meaning of punishment).

In 1993 two 10-year-old boys abducted a toddler from a shopping arcade near Liverpool and murdered him. Attempting to explain the vicious crime, a former deputy chief constable of Manchester echoed the condemnation of cockfighting printed in *The Manchester Mercury* some two centuries earlier, see *supra* note 264 and accompanying text, in saying: "The cruelty of boys toward animals—it is always boys—is only one step from the killing of a toddler. The urges are the same: experimentation with pain of others, the thrill of power over a helpless living thing, and a perverted need to destroy innocence and trust." William Miller, *Killing Stirs British Anguish*, BOSTON GLOBE, Feb. 21, 1993, at 2.

410. MANCHESTER MERCURY, Oct. 19, 1784.

411. MANCHESTER MERCURY, Aug. 28, 1792.

412. HANWAY, *supra* note 165, at 24; see also HANWAY, *supra* note 166, at 37 ("There are but few so perverse, that no arts of persuasion will work upon them, particularly in youth."). Samuel Denne said simply: "[M]any of the people committed to the county prisons are young offenders, and might be reclaimed" [DENNE], *supra* note 23, at 25. Although Denne thought solitary confinement could reform even old offenders, he was apparently less sure: "[T]hat it will operate powerfully on the more hard[en]ed villains, is no improbable conjecture." *Id.* at 50.

Late 18th-century prison builders and commentators in Massachusetts, New York, and Pennsylvania also concluded that young criminals would be most readily reformed. See HIRSCH, *supra* note 188, at 24–25, 31. David Rothman quotes from a report of the managers of the Philadelphia House of Refuge in 1826: "Youth . . . is particularly susceptible of reform. . . . No habit can then be rooted so firmly as to refuse a cure." ROTHMAN, *supra* note 232, at 213 (quoting MANAGERS OF THE PHILADELPHIA HOUSE OF REFUGE, AN ADDRESS TO THEIR FELLOW CITIZENS OF PHILADELPHIA 6–7 (Philadelphia 1826)). Rothman concludes that early prison builders focused on reforming the young: "The prototype offender . . . was not the hardened professional but the good boy gone bad, the amateur in the trade. This prisoner would . . . have the remnant of a conscience to torment him during his enforced solitude." *Id.* at 247.

My third question asked why the reform happened when it did, rising suddenly in the mid-1770's and reaching its peak with a frenzy of prison construction in the mid- to late 1780's. I suggest that the reformers' focus on young criminals helps to answer this question as well. The problem of child labor grew as sharply as did the nation's industrial output. The sudden, smashing success of the Sunday school movement in the mid-1780's reflected deeply felt and widespread concerns about the moral conditions of child laborers and demonstrated how urgently community leaders wanted to redress this new social threat. I suggest it was no coincidence that the Radcliffe mills controversy erupted in the same year as the Sunday school movement or that the Salford bench resolved to build a new prison the year after that.

The fourth question, finally, sought an explanation for what Robin Evans has called an "ambiguity of disposition" in the reformers—"a paradoxical combination of severity and gentleness, rigid autocracy and dispassionate altruism."⁴¹³ Do these words not describe the great majority of parents? The "discipline" of the modern prison regime takes on a less sinister tone when considered in the context of *young* prisoners, because patronizing guidance and mind control are (for better or worse) not inconsistent with ideas of loving child-rearing. Indeed, by Ignatieff's account, Howard's penal philosophy differed little from his method of raising his son. When the boy misbehaved, Howard would banish him to a root cellar for solitary reflection.⁴¹⁴

VII. EPILOGUE

It remains only to trace the legacy of the reform. The reform itself lasted less than a generation. By the mid-1790's the rash of prison building was over.⁴¹⁵ In Manchester it is likely that the principles of the reform did not long outlive Bayley, who died in 1802. As fitting punctuation to the end of an era, Bayley's successor as chairman of the quarter sessions—a Tory—renamed the new prison the "New Bailey" and denied his Whig predecessor the honor of the pun.⁴¹⁶

Although the reform died young, the reformers' fundamental belief in the reformability of young criminals was transplanted in a new movement that took shape a generation later, in the early decades of the nineteenth century. The juvenile reformatories and industrial schools established explicitly for the

413. EVANS, *supra* note 6, at 92.

414. See IGNATIEFF, *supra* note 12, at 48–49.

415. The forces that brought this first era of prison reform in Britain to a close are beyond our scope here. Ignatieff cites political factors primarily—resistance to the consolidation of state power and resentment of the confinement of political prisoners—but also mentions the administrative incapacity and corruption of many jailers and the suspicion in some quarters that imprisonment in solitary confinement was a form of intellectual torture. See IGNATIEFF, *supra* note 12, at 114–42. Ignatieff's evidence on these points is confined largely to London.

416. See AXON, *supra* note 69, at 202.

correction of young offenders in the mid-nineteenth century—and not the harshly regimented adult penitentiaries built in the same era—are the true heirs to the prison reform movement of the late eighteenth century. The strategy of the two reforms differed: Whereas the eighteenth-century reformers adapted the entire system of punishing minor offenses to suit the particular characteristics of young offenders, the nineteenth-century juvenile reformers split the mechanism for punishing young offenders from the apparatus of adult punishment. The new reformers specifically labeled their concern “juvenile delinquency”⁴¹⁷ and did not pretend to address the problem of crime in general.⁴¹⁸ Just as the new juvenile reformatories inherited their philosophy and techniques from the reformed prisons of Bayley’s day, the juvenile reformers inherited their compassionate rhetoric and naive anticipation of success from the reformers of Bayley’s day.

The irony is that the juvenile reform movement of the nineteenth century took root in an age that ridiculed the idealism of the late eighteenth-century reform movement. Wrongly attacking the earlier reformers for the belief that all criminals could be reformed, public leaders of the early nineteenth century embraced the reformers’ fundamental belief in the reformability of the young. Hence in 1828 a committee of the House of Commons openly questioned whether penitentiaries were better at reforming prisoners than was transportation or even confinement in the hulks.⁴¹⁹ Yet that same committee floated a proposal for a separate prison “for the reception of young criminals, in which such a system of strict, and if necessary, severe discipline might be enforced as should appear best calculated to reclaim the convicted.”⁴²⁰ Similarly, in 1837 a parliamentary select committee declared that “the mind of a person disposed to commit a crime is precisely that of a gambler” and “can

417. The term dates back to at least the 1815 formation of the Committee for Investigating the Causes of the Alarming Increase of Juvenile Delinquency in the Metropolis (later renamed the Society for the Improvement of Prison Discipline and for the Reformation of Juvenile Offenders). See JUVENILE OFFENDERS, *supra* note 279, at 106.

418. In the preface to her 1853 work *Juvenile Delinquents*, Mary Carpenter declared the independence of juvenile correction from adult punishment:

Whatever views may be entertained respecting adult criminals, all agree that *reformation* is the object to be aimed at with young offenders; nor is it doubted that the GAOL is not a true Reformatory School, though at present the only one provided by our country; since thousands of young children annually committed to it come forth not to diminish, but to swell the ranks of vice.

MARY CARPENTER, JUVENILE DELINQUENTS: THEIR CONDITION AND TREATMENT at xxxvii (photo. reprint 1970) (1853).

419. See *Report from the Select Committee on the Police of the Metropolis*, in BRITISH PARLIAMENTARY PAPERS, CRIME AND PUNISHMENT, 4 POLICE 54 (Irish Univ. Press, photo. reprint 1968) (1828) [hereinafter *Report on the Police*] (testimony of John Wontner). A committee member prompted a witness to comment on the frequent recidivism of convicts and then asked: “Then, in point of fact, you do not find any difference, whether [convicts] have been sent to New South Wales . . . or whether they have undergone imprisonment in the Penitentiary or served their time in the hulks?” The witness, who served as the keeper of Newgate prison, allowed that there was “scarcely any difference.” *Id.*

420. *Id.* at 8.

only be restrained by fear."⁴²¹ Yet that same committee endorsed the notion that a penal colony for boys recently established at Point Puer in Australia could "withdraw [young criminals] from the fangs of vice, and . . . render them useful members of society."⁴²² And in 1854 the chaplain of Pentonville penitentiary condemned the theory of penitentiary confinement: "Separate confinement is no panacea for criminal depravity. It has been supposed capable of reforming a man from habits of theft to a life of honesty, of vice to virtue. It has no such power. No human punishment has ever done this."⁴²³ Yet that same year Parliament acted to establish juvenile reformatory schools.⁴²⁴

Likewise, even as the principles of the earlier reform movement were dismissed as fanciful, its rhetoric was revived and applied to the newly isolated problem of juvenile delinquency. In 1820 Sir John Eardley-Wilmot, one of the most influential proponents of specialized treatment of juvenile offenders, explained the rationale for a juvenile justice system in terms hauntingly similar to the rhetoric of the earlier reform. Eardley-Wilmot worried about "the early initiation of youth into habits of vice and licentiousness."⁴²⁵ Severe punishments, he argued, will not deter crime because they are never strictly enforced and offenders expect impunity.⁴²⁶ He praised prison labor as a "sure

421. *Report from the Select Committee on Transportation*, in 22 BRITISH PARLIAMENTARY PAPERS at xx–xxi (1837–38) [hereinafter *Report from the Select Committee on Transportation*]. The committee elaborated on the mindset of the gambling criminal in terms remarkably similar to those employed by Josiah Dornford in 1785, see *supra* note 207 and accompanying text:

He hopes, that, if he commit a crime, he will escape detection; that, if detected, he will escape conviction; that, if convicted, he will be pardoned or get off with a few years in the hulks or Penitentiary; that, if transported, he will be sent to New South Wales; that, if sent to New South Wales, he will be as well off, as are some of his acquaintances, and make a fortune.

Report from the Select Committee on Transportation, *supra*, at xxi.

422. *Report from the Select Committee on Transportation*, *supra* note 421, at 268. Point Puer was not the first penal institution especially for juveniles. A separate convict hulk was established in 1822. See 5 SIR LEON RADZINOWICZ & ROGER HOOD, A HISTORY OF ENGLISH CRIMINAL LAW AND ITS ADMINISTRATION FROM 1750, at 142 (1986). In 1838, Parliament resolved to build a juvenile penitentiary. See The Parkhurst Act, 1838, 1 & 2 Vict., ch. 82. All three experiments failed. See 5 RADZINOWICZ & HOOD, *supra*, at 140–44, 148–55.

423. JOSEPH KINGSMILL, CHAPTERS ON PRISONS AND PRISONERS (London, Longman, Brown, Green, and Longman's, 3d ed. 1854), quoted in IGNATIEFF, *supra* note 12, at 200. Robin Evans argues that in the mid-19th century, opinion hardened around the notion that "[c]riminals were born and not bred." He notes that the word "criminality" was rarely used before that time. As crime came to be seen as a function of human nature, faith in the reformability of criminals diminished. See EVANS, *supra* note 6, at 396–97.

424. See 17 & 18 Vict., ch. 86 (1854); 5 RADZINOWICZ & HOOD, *supra* note 422, at 177. Rothman notes a similar phenomenon in mid-19th-century America:

As it became increasingly evident that the prison offered little prospect for reform, some officials and philanthropists, usually in large urban areas, devoted fresh energy to separating the youthful from the adult offenders; perhaps an institution devoted exclusively to juvenile delinquents could succeed where others, with an older and more experienced criminal population, could not.

ROTHMAN, *supra* note 232, at 257; see also *id.* at 262–64 (explaining public's continuing approval of juvenile reformatory despite growing condemnation of adult prisons).

425. JOHN EARDLEY EARDLEY-WILMOT, A LETTER TO THE MAGISTRATES OF WARWICKSHIRE 17 (London, H.T. Hodgson 1820).

426. See *id.* at 6–8.

antidote to vice,"⁴²⁷ but argued that education of youth would do more to prevent crime than any prison.⁴²⁸ Eardley-Wilmot wrote with greatest feeling about his fear that young offenders, if not kept separate in prison, will be "nourished by the intercourse with hardened villains . . . [and] ripened to maturity by every aid, which bad example and a total ignorance of the laws of their Creator cannot fail to administer."⁴²⁹ Once released from his first commitment for his earliest offense, the young offender "plunges at once into those vicious courses of profligacy and crime, which increase in magnitude as they increase in number, till an ignominious death closes his career, at an age when his mind has not yet reached the first dawns of sober reflection."⁴³⁰

427. *Id.* at 33.

428. *Id.* at 35.

429. *Id.* at 11–12.

430. *Id.* at 12. Examples abound of the similarity in rhetoric of the two movements. In its 1818 report the Society for the Improvement of Prison Discipline and for the Reformation of Juvenile Offenders put forth this analysis of juvenile delinquency:

The moral condition of a human being is seldom, if ever, stationary; we must improve in virtue, or become hardened in vice; the guilty youth . . . who pilfers in his early days . . . will not pass through life without still more flagrant violations

. . . .
The first and principal cause of youthful aberration from the path of virtue, is the neglect of moral and religious Education. . . . Subsidiary to this cause, and most powerfully operative, is the bad example of parents, who, by their own conduct, initiate their children in vice

. . . .
There exist in this Metropolis and its vicinity, houses of public resort, technically termed Flash-houses: some of these, boys and girls frequent, in company with the most notorious thieves Woe be to the child who once enters these sinks of iniquity; at once assailed by example, temptation, and deliberate seduction. If still untainted by crime, hence he dates his first transgression; if conversant with petty offences only, hence he plunges into all the depths of vice and misery. Here he finds . . . an instructor in the arts of depredation [I]t is high time we should . . . utterly extirpate all these nurseries for depravity, and retreats of vice. . . .

. . . .
The public has repeatedly heard that the Criminal Code is not carried into execution against adults, from the forbearance of prosecutors, and the humanity of juries, and that the consequence is impunity. . . . [B]ut all do not perceive, that where the offender is of tender years, the chance of impunity is still greater, its effect still more mischievous. Mankind are naturally more compassionate to youthful errors [H]ope of escape operates as a direct encouragement; for young minds are naturally sanguine

A cause still remains, more fruitful of crime, more baneful in its effects, and more disgraceful to a moral and religious nation, than any or all of the causes before enumerated. This cause is the present state of our Prison Discipline. It is certainly not too much to say, that amongst children of a very early age, absolute impunity would have produced less vice than confinement in almost any of the gaols in the metropolis

Now mark the operation on the youthful offender *There is no classification* according to the nature of offences and the degree of guilt. He is immediately thrown amongst the veterans in crime; his fears are derided, his rising repentance subdued, his vicious propensities cherished and inflamed. Here he finds able and willing tutors in all the varieties of crime But this is not all. His errors may have arisen from the want of instruction; and his great defect may have been that he was ignorant. So he must remain—of virtue at least—for the prison furnishes no means of education

. . . [The Committee] are convinced that Education and Religious Instruction will do more to stay the irruption of vice and depravity, than all the regulations which the wisdom or ingenuity of legislators can invent. They urge, therefore, the support and extension of Schools

REPORT OF THE COMMITTEE OF THE SOCIETY FOR THE IMPROVEMENT OF PRISON DISCIPLINE, AND FOR THE REFORMATION OF JUVENILE OFFENDERS 8–9, 12–19, 21 (London, Bensley & Sons 1818) [hereinafter

Eardley-Wilmot's conclusion was not, like Bayley's, that youths should be prosecuted for their earliest offense, but rather that youths should *not* be prosecuted for their earliest offense. He proposed a system of noncriminal adjudication that would keep youths entirely apart from adult convicts.⁴³¹

Given the ideological affinity between the two movements, it should be no surprise that Eardley-Wilmot's proposals and Parliament's first juvenile justice acts focused on the crime of simple larceny.⁴³² The punishment of petty larceny constituted almost the whole business of Bayley's court of quarter sessions in Manchester and almost the whole corrective mission of the New Bayley.⁴³³ Then, as now, petty theft was the first crime of many young criminals.⁴³⁴ Nor should it be surprising that Eardley-Wilmot's proposals and Parliament's first juvenile justice acts put the punishment of juvenile crime in the hands of local magistrates.⁴³⁵ Magistrates such as Bayley and Paul long had played a role in guarding the morality of the community's youth through their jurisdiction over the care of parish apprentices and the petty crimes that youths commit. It should not be surprising that even within the newly created juvenile justice system there were separate institutions for children who had committed crimes punishable by imprisonment and children whose offenses were less serious.⁴³⁶ The juvenile reformers recognized, as did Bayley and his contemporaries, the importance of separating the most experienced offenders from the most reclaimable. It should be no surprise, finally, that the new juvenile reformers claimed Howard as their spiritual guide: "All who reverence the sacred memory of the illustrious Howard," wrote the leading

REPORT OF THE SOCIETY FOR THE IMPROVEMENT OF PRISON DISCIPLINE]; *see also*, e.g., J.T.B. Beaumont, *A Letter to Lord Sidmouth*, 9 THE PAMPHLETEER 448-49 (1817), *quoted in* TOBIAS, *supra* note 154, at 38 ("[F]lash-houses and cock and hen clubs [are] the most effectual nurseries, academies, and houses of call for vices and crimes that can be devised."); *Report on the Police*, *supra* note 419, at 52 (testimony of John Wontner) (reporting keeper of Newgate's response to question about increase of crime among juveniles: "[T]here is a regular system of nurture by the old thieves of the young lads."); EDWARD G. WAKEFIELD, *FACTS RELATING TO THE PUNISHMENT OF DEATH IN THE METROPOLIS* (1831), *reprinted in* JUVENILE OFFENDERS, *supra* note 279, at 142-44 (describing process of corruption of youngsters in one of London's many "nurseries of petty offences").

431. *See* JOHN EARDLEY EARDLEY-WILMOT, *A SECOND LETTER TO THE MAGISTRATES OF WARWICKSHIRE* 12-14 (London, H.T. Hodgson 1820).

432. *See* EARDLEY WILMOT, *LETTER OF 1827*, *supra* note 381, at 26; An Act for the More Speedy Trial and Punishment of Juvenile Offenders, 1847, 10 & 11 Vict., ch. 82; An Act for the Further Extension of Summary Jurisdiction in Cases of Larceny, 1850, 13 & 14 Vict., ch. 37.

433. *See supra* note 146 and accompanying text. Recall that the lack of any appropriate punishment for petty larceny moved Henry Fielding in 1753 to propose a broader use of imprisonment. *See supra* notes 237-40 and accompanying text.

434. *See* CARPENTER, *supra* note 418, at 17 ("[As] varied as are the offences of adults, those for which children are arraigned in a criminal court are almost invariably thefts more or less trivial . . .").

435. *See supra* note 432 and sources cited. Parliament gave magistrates the authority to deal summarily with juvenile larcenies.

436. *Compare* An Act for the Better Care and Reformation of Youthful Offenders in Great Britain, 1854, 17 & 18 Vict., ch. 86 (establishing "reformatory schools") with An Act To Make Better Provision for the Care and Education of Vagrant, Destitute, and Disorderly Children, and for the Extension of Industrial Schools, 1857, 20 & 21 Vict., ch. 48 (establishing "industrial schools") and 5 RADZINOWICZ & HOOD, *supra* note 422, at 177-78, 208 (discussing implementation of industrial schools).

juvenile reform group in its 1818 report, "will look with a favourable eye on the humble efforts of those who, taking his bright example for their guide, seek to follow in the same path."⁴³⁷ In a sense, the historical heritage of juvenile punishment had come full circle: Howard had gathered his ideas of prison discipline in part from his studies of juvenile reformatories in Rome and Genoa.⁴³⁸

Growing up in the early nineteenth century alongside the new institutions of juvenile punishment was a sibling system of adult penitentiary confinement, characterized at Pentonville and in the Philadelphia and Auburn systems by brutally repressive solitude and imposed silence.⁴³⁹ Although in some sense the offspring of the New Bayley and prisons like it, these penitentiaries were ideological orphans. The builders of the New Bayley and the other reformed prisons of the late eighteenth century intended them to serve a population of young criminals who were susceptible to correction and could therefore be made better by subtle techniques of solitary reflection (without total solitude), prayer, and constructive labor. Their prisons would perhaps "*soften[]* the mind,"⁴⁴⁰ in Howard's words that sound so sinister today, but they would not resort to the mind-breaking techniques of the nineteenth-century penitentiaries.

If those penitentiaries did not descend from the *ideas* of the eighteenth-century reformers, they did descend from the institutions the reformers built. A technique that evolved in response to the problem of young offenders quickly overgrew its bounds to cover almost the entire penal landscape. Ideologies are, of course, rarely capable of controlling their technological offspring. The New Bayley and other Howardian prisons proved the feasibility of confinement for longer terms and on a larger scale than had previously been attempted. As dissatisfaction with the Bloody Code, transportation to Australia, and the still-floating hulks persisted in the early nineteenth century, these prisons suggested the most obvious way to fill the penal vacuum.

In many cases these aging Howardian monuments themselves filled the vacuum. The New Bailey, for example, quickly ceased to operate according to Bayley's vision, yet continued to take on prisoners. It was extended in 1816, and by 1818 its 382 cells held as many as 752 prisoners.⁴⁴¹ By 1827 the New Bailey had 522 cells with a rated capacity of 968.⁴⁴² An inspector's

437. REPORT OF THE SOCIETY FOR THE IMPROVEMENT OF PRISON DISCIPLINE, *supra* note 430, at 32.

438. See HOWARD, PRISONS, *supra* note 3, at 114, 116, 120.

439. See IGNATIEFF, *supra* note 12, at 3-11, 194-200.

440. HOWARD, LAZARETTOS, *supra* note 3, at 226.

441. See *An Account of All the Gaols, Houses of Correction or Penitentiaries in the United Kingdom*, reprinted in BRITISH PARLIAMENTARY PAPERS, CRIME AND PUNISHMENT, 8 PRISONS 461, 486-87 (Irish Univ. Press, photo. reprint 1970) (1819). A witness before a parliamentary committee in 1819 painted an even gloomier picture: "That [prison] at Manchester was once excessively crowded, there were seven hundred and fifty-two prisoners confined in one hundred and fifty cells, each of those cells intended only for one prisoner . . ." 7 BRITISH PARLIAMENTARY PAPERS 320 (1819) (testimony of Joseph John Gurney). I suspect some exaggeration in this account.

442. See DeLacy, *supra* note 134, at 492.

report presented to Parliament in 1837⁴⁴³ condemned the institution in terms reminiscent of Bayley and Clowes' 1783 report on the old Manchester House of Correction. The inspector found the male prisoners picking cotton and oakum in a single poorly ventilated workshop that was rendered "almost intolerable" by the "crowded numbers and the impurity of the air." When not picking oakum—pulling apart pieces of old rope for use in caulking—many prisoners "walked" the treadmill, which resembled the waterwheel of a steamship and harnessed the men's energy to grind stones into sand.⁴⁴⁴ Bayley and Clowes would no doubt have denounced such "unprofitable Sort[s] of Labour"⁴⁴⁵ as well as the absence of any instruction for older prisoners. Only those under sixteen were schooled. There was, moreover, easy "communication" between male and female prisoners. Solitary imprisonment served generally only as a punishment for refractory inmates. Although the prison operated nominally under the "silent system," under which the prisoners mingled freely but were not allowed to speak, the system had no observable good result, "as in similar cases where only half measures are resorted to."⁴⁴⁶ Yet the New Bailey remained in operation until 1868.

The patrimony of the late eighteenth-century British penal reform is the archipelago of modern penitentiaries in which adult criminals sit undisturbed by the reforming regimen of solitary reflection, piety, and labor that characterized the penal forebears of these penal warehouses. Not conceived to address the problem of serious adult crime, prisons are now haphazardly adapted to the purpose. About these institutions there can be no agreement except that they are, at best, the least terrible of imaginable solutions to our modern crime problem. For them history can offer no apologies. Yet I hope to have proposed an explanation, one that does not depend solely on mechanistic or class-based theories stretched beyond their powers of explanation and one that does not presume that evil is begotten by evil. This explanation may prove valid outside Manchester. Even if it does not, I hope that this account of Bayley's penal reform in Manchester restores a sense of

443. *Second Report of the Inspectors of Prisons of England, Northern and Eastern District, reprinted in 32 BRITISH PARLIAMENTARY PAPERS 594–604 (1837) [hereinafter *Second Report of the Inspectors*].*

444. *Id.* at 596–97.

445. CLOWES & BAYLEY, *supra* note 5, at 1.

446. *Second Report of the Inspectors, supra* note 443, at 599. The New Bailey was not the only prison to abandon Howard's principles. In 1835 a committee of the House of Lords found that of 136 "reformed" prisons, only 36 (at most) maintained separate sleeping cells. *See* WEBB & WEBB, *supra* note 6, at 106 n.1.

David Rothman calls the process by which America's early reforming prisons became places of mere confinement "the shift from reform to custody." He explains the shift this way.

The first proponents of institutionalization had generally assumed . . . that those starting to follow a life in crime would enter the penitentiaries These preconceptions proved woefully inadequate. By the outbreak of the Civil War, . . . penitentiary cells filled up with hardened criminals The intricate designs of the asylum builders did not suit this clientele. [T]he rules of silence and separation [had not been planned] for the ten- to twenty-year convict. Under these conditions, superintendents were content to administer a custodial program.

ROTHMAN, *supra* note 232, at 238–39. Rothman devotes a chapter of *The Discovery of the Asylum* to explaining how reforming institutions so long outlived their original purpose. *Id.* at 237–64 (ch. 10).

poignancy and desperation to the history of the late eighteenth-century reform. Buried under treatises on warfare and plague, on class turmoil and ideological tumult, lies an essentially human struggle to save a town's youth.